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ALEXANDER L. STEVAS
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DAVID E. KEMPNER,

Appellant,

v.

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY, TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO and METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,

Appellees.

On Appeal From the Court of Appeals of Michigan

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Is a State's public-sector agency shop statute repugnant to the First Amendment's ban on laws coercing political and ideological conformity where the statute, as applied by the State's administrative agencies and courts, licenses the union—prior to a governmental adjudication of the amount of a constitutionally permissible agency shop fee—to either (a) spend an objecting employee's compulsory fees for political, ideological and other non-collective bargaining purposes or (b) secure the discharge of an objecting employee for failing to pay, except into escrow, the disputed fee amount?

II. Is due process of law denied, and are the First Amendment freedoms of association and petition impermissibly abridged, by a State's public-sector agency shop statute which, as applied by the State's administrative agencies and courts, requires objecting non-union employees to exhaust non-governmental, intra-union rebate procedures as a precondition to securing governmental protection of their constitutional rights?

PARTIES

All parties named in the caption were parties in the proceedings below. However, since the constitutionality of a statute of the State of Michigan is drawn in question in this appeal, and neither the State nor any agency, officer or employee thereof is a party to the appeal, it is noted that 28 U.S.C. § 2403(b) may be applicable.

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Appellees.

On Appeal From the Court of Appeals of Michigan

JURISDICTIONAL STATEMENT

Appellant David E. Kempner appeals from that part of the final judgment of the Michigan Court of Appeals which holds that Section 10(1)(c) and (2) of the Michigan Public Employment Relations Act ("PERA"), Mich. Comp. Laws § 423.210(1)(c) and (2) (1979), as interpreted and applied by the Michigan Employment Relations Commission and the Court of Appeals, is not repugnant to either the First Amendment to the Constitution of the United States (made applicable to the states by the Fourteenth Amendment) or the due process clause of the Fourteenth Amendment.

OPINIONS BELOW

The published opinion of the Michigan Court of Appeals, which appears in Appendix (App.) A, *infra,* pp. 1a-10a, is reported as *Kempner v. Local 2077, AFL-CIO,* 126 Mich. App. 452, 337 N.W.2d 354 (1983). The order of the Supreme Court of Michigan entered on June 8, 1984, denying appellant Kempner's timely application for leave to appeal and motion for peremptory reversal is unreported and is set forth in App. D, *infra,* p. 48a. The opinions of the Michigan Employment Relations Commission and its administrative law judge dismissing the unfair labor practice charge, which appear in App. B, *infra,* pp. 11a-45a, are reported as *Dearborn Local 2077,* 1982 MERC Lab. Op. 287 and 291, respectively.

JURISDICTION

This is an appeal from a final judgment entered by the Michigan Court of Appeals affirming the dismissal by the Michigan Employment Relations Commission ("MERC" or "the Commission"), a state administrative agency, of an unfair labor practice charge ("charge") filed by appellant David E. Kempner on behalf of Ms. Christine D'Alleva.[1] By dismissing the charge MERC sanctioned the attempts of appellees Local 2077 and its affiliate Council 25 ("the union") to cause the City of Dearborn to discharge Ms. D'Alleva for failing to pay, except into escrow, the agency shop fee ("fee") even though the amount demanded had not been adjudicated before MERC or a court to be the

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[1] The charge, although filed by appellant Kempner, relates to alleged discrimination against public employee D'Alleva for claiming her First Amendment right not to pay, even temporarily, that portion of the agency shop fee which the union spends on activities that are outside the scope of its statutory authorization. Under Michigan law anyone can file an unfair labor practice charge. PERA § 16(a), Mich. Comp. Laws § 423.216(a) (1979).

constitutionally permissibe fee amount under this Court's decision in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

From the opening statement at the MERC unfair labor practice hearing and continuing throughout the proceedings in both the administrative agency and the appellate courts, appellant Kempner drew into question the validity of Michigan's public-sector agency shop statute on the ground of its repugnancy to the First and Fourteenth Amendments to the Constitution of the United States: —if the statute were applied to require Ms. D'Alleva to either give the union unrestricted possession of the demanded fees before the constitutionally permissible fee amount has been adjudicated, or be discharged for failing to pay, except into escrow, the disputed fee; and/or—if the statute were applied to require Ms. D'Alleva to exhaust non-governmental, intra-union rebate procedures as a precondition to governmental protection of her constitutional rights.

Both MERC and the Court of Appeals rejected these arguments and in dismissing the charge held that Ms. D'Alleva must both pay the contested fees to the union *and* exhaust the union's internal rebate procedures before her charge could be adjudicated. In explicitly holding the statute constitutional as applied, the court stated:

> We adopt the conclusion . . . that escrow accounts are *not* permitted, as more fully reflective of the United States Supreme Court's decision in *Abood* . . . and *Brotherhood of Railway & Steamship Clerks v Allen*, 373 US 113 . . . (1963).
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> • • •
>
> Plaintiff's arguments overlook the *encouragement* given to [intra-union rebate procedures] by the United States Supreme Court [in *Abood* and *Allen*].
>
> • • •
>
> In light of those expressions by the . . . Court, we are compelled to conclude that a required exhaustion of

> internal union remedies by non-members as to agency fee protests is constitutionally permissible.

App. A, *infra*, p. 5a-6a, 7a, 8a (emphasis in original; citations, quotations, and footnote omitted).

The judgment sought to be reviewed is deemed to have been entered on June 8, 1983, as part of the opinion of the Michigan Court of Appeals. App. A, *infra*, p. 1a. Mr. Kempner's timely application for rehearing on federal constitutional issues was denied by the Court of Appeals on July 20, 1983. App. C, *infra*, p. 46a. The Supreme Court of Michigan denied his timely application for leave to appeal and motion for peremptory reversal by an order entered on June 8, 1984. App. D, *infra*, p. 48a. A notice of appeal to this Court was filed in the Michigan Court of Appeals on June 26, 1984. App. E, *infra*, p. 49a-50a.

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257(2). Because the Michigan Supreme Court denied Mr. Kempner's application for leave to appeal, the Court of Appeals is the highest court of Michigan in which the decision could be had. *Abood*, 431 U.S. at 216. Jurisdiction lies under 28 U.S.C. § 1257(2), where a state court rejects a contention that a state statute as applied is repugnant to the United States Constitution. *E.g., Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979); *Abood*, 431 U.S. at 215-16.

In the alternative, should this Court not consider appeal to be the appropriate method of bringing these issues before the Court, appellant Kempner respectfully requests that these appeal papers be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §§ 1257(3) and 2103, and Sup. Ct. R. 17.1(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

The pertinent part of the challenged state statute, Mich. Comp. Laws § 423.210(1)(c) and (2) (1979), reads as follows:

> (1) It shall be unlawful for a public employer or an officer or agent of a public employer * * * (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further, That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative. . . .
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> (2) It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer, that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative.

STATEMENT OF THE CASE

As noted above, appellant Kempner filed an unfair labor practice charge ("charge") with the Michigan Employment Relations Commission ("MERC" or "the Commission") on behalf of former public employee Christine D'Alleva.[2] Appellees Local 2077 and Council 25 ("the union") were Ms. D'Alleva's exclusive bargaining representative pursuant to the Public Employment Relations Act ("PERA"), Mich. Comp. Laws §§ 423.210-16 (1979). Ms. DAlleva was never a member of the union. App. B, *infra,* pp. 15a-17a.

Ms. D'Alleva's employer, the City of Dearborn, and the union had entered into a collective bargaining agreement which included an agency shop clause authorized by PERA § 10(1)(c) and (2), Mich. Comp. Laws § 423.210(1)(c) and (2). As a condition of employment nonmember public employees were required to pay the union an agency shop fee ("fee") equal to membership dues. From the beginning, Ms. D'Alleva has been willing to pay that portion of the fee used solely for collective bargaining, contract administration and grievance adjustment ("collective bargaining"). To that end, she repeatedly requested, both orally and in writing, a breakdown of the uses made by the union of the fee. App. B, *infra,* pp. 17a-18a, 20a-21a, 23a.

When she was first informed in the fall of 1976 of the agency shop requirement, Ms. D'Alleva submitted a protest letter to the union, which all parties have stipulated constituted the notice of objection required by *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 241 (1977), and other decisions of this Court, to claim one's constitutional right to pay only the union's pro rata cost of performing its statutory duties as the exclusive bargaining representative. In response to her protest letter the local union president informed Ms. D'Alleva that if she objected and wrote

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[2] *See* note 1, *supra* at 2.

AFSCME International's Secretary-Treasurer each year she could receive a refund, but only for partisan politics. The previous refund was approximately 2% of the International's portion of the fee. Nevertheless, in the meantime the union again demanded that she pay the *entire* dues-equivalent fee or face discharge. When Ms. D'Alleva did not pay the entire fee, the union formally asked the City to discharge her. Citing the then pendency of *Abood* before this Court, the City refused the union's discharge request. App. B, *infra,* pp. 18a, 20a-21a.

To enforce its demand that Ms. D'Alleva be discharged, the union then filed a grievance which eventually ended in arbitration. Under pressure from the arbitrator, the union, for the first time, offered to unilaterally reduce its fee demand, from 100% of dues to 93.4%. This 6.6% reduction was based on the average of AFSCME International's internal rebate appeals calculations [3] for the prior five years. Ms. D'Alleva rejected paying the reduced amount because the union had never presented any financial documentation for the reduced amount, and because it was not the product of a neutral judicial or administrative adjudication. However, to show her good faith she offered to place 100% of the disputed fees in an escrow account. The union rejected this offer [4] and continued to press for Ms. D'Alleva's discharge. App. B, *infra,* pp. 19a, 21a-23a, 25a-26a.

It was at this point that Ms. D'Alleva turned to the state, starting with MERC, for protection of her statutory and

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[3] These calculations are limited to the pro rata amount of AFSCME International's expenditures for "*partisan* political or ideological purposes," App. F, *infra,* p. 51a (emphasis added). They do not include rebates for either the organizing and non-bargaining unit litigation expenditures of the International or *any* expenditures of the two appellees herein. *See infra* at 16 n.13, 17 n.14.

[4] Despite the union's rejection of Ms. D'Alleva's escrow offer, she subsequently placed all the disputed fees into an escrow account. App. B, *infra.* p. 20a.

constitutional rights.[5] The charge, filed on behalf of Ms. D'Alleva, practically quoted verbatim the Commission's earlier order in *Garden City*, where the unions were ordered to cease and desist from

> [c]ausing or attempting to cause a public employer to discriminate against public employees because they have failed to pay except into escrow any fees in lieu of dues which have not already been adjudicated to be permissible fees under the Supreme Court's decision in *Abood*. . . .

App. G, *infra*, pp. 68a-69a, 70a (citation omitted); *see also* App. B, *infra*, pp. 16a-17a, 28a.

Instead of finding that the union's demands constituted an unfair labor practice and issuing an appropriate remedial order, MERC dismissed the instant charge. The Commission declined to follow *Ball* and its own decision in *Garden City* and rejected the constitutional arguments for escrow and against exhaustion because of two intervening Michigan Court of Appeals' decisions.[6] Instead it held:

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[5] The charge did not specifically assert that PERA was repugnant to the First Amendment because after the decision in *Abood*—but prior to the filing of the charge—both the Michigan Court of Appeals and MERC had applied PERA in a constitutional manner by permitting objecting employees to escrow their fees pending the union's adjudication before MERC or a court of the fee amount to which it is constitutionally entitled. *Ball v. City of Detroit*, 84 Mich. App. 383, 397, 269 N.W.2d 607, 613 (1978); *Garden City School Dist.*, 1978 MERC Lab. Op. 1145, 1156-58, *reh'g denied*, 1978 MERC Lab. Op. 1282, App. G, *infra*, pp. 65a-67a, 68a-69a.

[6] *Detroit Bd. of Educ. v. Parks*, 98 Mich. App. 22, 296 N.W.2d 515 (1980), *aff'd*, 417 Mich. 268, 335 N.W.2d 641 (1983); *White Cloud Educ. Ass'n v. Board of Educ.*, 101 Mich. App. 309, 300 N.W.2d 551 (1980), *Jurisdictional Statement filed sub nom. Jibson v. White Cloud Educ. Ass'n*, 52 U.S.L.W. 3846 (U.S. May 7, 1984) (No. 83-1816).

> After careful review of the *constitutional* and policy arguments advanced by the parties we are of the view that the position adopted by the ALJ dismissing the charge because charging party has not paid the disputed fees directly to the union or exhausted the internal rebate procedure reflects the current law of the state. Therefore we affirm his findings and adopt his recommendation, pending further clarification by the courts of the *constitutional issues* presented by this case.

App. B, *infra*, p. 14a (emphasis added).

Appellant Kempner pursued the federal constitutional attacks on the Commission's application of PERA on appeal. On June 8, 1983, the Court of Appeals affirmed MERC's dismissal of the charge. Like MERC, the Court of Appeals declined to follow the holdings of *Ball* in favor of escrow and against exhaustion. Relying instead on this Court's discussion of suggested remedies in *Abood*, as well as on language in the opinions of *International Ass'n of Machinists v. Street*, 367 U.S. 740, 772 (1961) and *Railway Clerks v. Allen*, 373 U.S. 113, 120, 122 (1963), the Court of Appeals held that its application of PERA was constitutional. App. A, *infra*, pp. 5a-8a.

A timely application for rehearing was filed because the Court of Appeals had not addressed the Fourteenth Amendment due process issue involved in requiring objectors to exhaust intra-union rebate procedures and because it had not had access to two intervening federal decisions,[7] which illuminated the constitutional infirmities of an exhaustion requirement (and in one case, specifically required escrow as well). Without opinion the Court of Appeals denied that application on July 20, 1983, "for lack of merit in the grounds presented." App. C, *infra*, p. 47a.

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[7] *Perry v. Local 2569*, 708 F.2d 1258, 1261-63 (7th Cir. 1963); *Robinson v. New Jersey*, 565 F. Supp. 942 (D.N.J. 1983), *rev'd*, —— F.2d —— (3d Cir., Aug. 6, 1984).

Appellant Kempner then timely applied for leave to appeal to the Michigan Supreme Court, raising the same constitutional issues as below. On May 14, 1984, a motion for peremptory reversal was also filed with the Michigan Supreme Court because this Court's then just-released *Ellis v. Railway Clerks,* —— U.S. ——, 104 S. Ct. 1883 (1984); and *McDonald v. City of West Branch,* —— U.S. ——, 104 S. Ct. 1799 (1984), decisions added further support to the constitutional challenge to PERA. An order denying both the motion for peremptory reversal and the application for leave to appeal, because the court was "not persuaded that the questions presented should be reviewed", was entered on June 8, 1984. App. D, *infra,* p. 48a.

THE FEDERAL QUESTION IS SUBSTANTIAL

The questions this appeal presents were answered by this Court for the first time on April 25, 1984 in *Ellis v. Railway Clerks,* —— U.S. ——, 104 S. Ct. 1883 (1984). *Ellis* establishes that the rulings of the Michigan Court of Appeals on both escrow and the exhaustion of intra-union rebate procedures are erroneous. Indeed, it is hard to imagine how this Court could have been more explicit in rejecting the stated basis for those rulings.

As stated already, the Court of Appeals defended the constitutionality of its escrow and exhaustion rulings because of this Court's discussion of suggested remedies in *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 237, 242 (1977) and *Railway Clerks v. Allen,* 373 U.S. 113, 120, 122 (1963). *See* App. A, *infra,* pp. 5a-8a. However, in *Ellis* the Court stated unequivocally that those opinions "did not, nor did they purport to, pass upon the statutory or *constitutional* adequacy of the suggested remedies. Doing so now, we hold that the pure rebate approach is inadequate." *Ellis,* 104 S. Ct. at 1890 (emphasis added, footnote omitted). The Court then explained its reasoning for this holding:

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.
>
> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or *interest-bearing escrow accounts,* that place only the slightest additional burden, if any, on the union. *Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily.* A rebate scheme reduces but does not eliminate the statutory violation.

Id. (emphasis added).

In short, *Ellis* establishes that throughout this case appellant Kempner has correctly argued, citing the traditional First Amendment principles applied in *Abood,* 431 U.S. at 233-36, that the only valid application of Michigan's public-sector agency shop statute is one which prevents even *temporary* use of coerced fees for impermissible purposes by providing for escrow of the fees while the government—not some intra-union scheme—adjudicates the constitutionally permissible amount.

Question I

In 1977, this Court addressed the facial constitutionality of the same statute at issue here. The Court held in *Abood,* 431 U.S. at 222, 232, that an agency shop agreement "[t]o compel employees financially to support their collective-

bargaining representative has an impact upon their First Amendment interests," but is constitutional "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance adjustment purposes."

However, the Court also concluded that if the fee is used "for political and ideological purposes unrelated to collective bargaining," the arrangement violates the First Amendment. *Id.* at 232-37. Because the *Abood* appeal arose from a judgment on the pleadings, the Court addressed the issue of the appropriate remedy only in *dicta,* leaving this important question for resolution in subsequent litigation. *Id.* at 236-42. Justice Stevens emphasized that the disposition of *Abood* reserved the very questions presented on this appeal:

> By joining the opinion of the Court, including its discussion of possible remedies, I do not imply—nor do I understand the Court to imply—that the remedies described in *Street* . . . and *Allen* . . . would necessarily be adequate in this case or in any other case. More specifically, the Court's opinion does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.

Id. at 244 (Stevens, J., concurring) (citations omitted).

The issue anticipated by Justice Stevens has now arisen in several lower courts, with conflicting results. Ironically, the first lower court to confront the post-*Abood* question of the proper procedure to prevent coerced political, ideological, and other non-collective bargaining "loans" was the Michigan Court of Appeals.[8] In 1978 the court said:

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[8] In a pre-*Abood* decision, the Minnesota Supreme Court had held that procedural due process entitles an objecting employee to an injunction against the use of fees until the validity of their

> [W]e agree with plaintiffs that allowing the union the use of funds prior to a judicial determination subjects nonmembers to the risk that their fees may be used, even temporarily, for activities to which they are opposed. Because fundamental First Amendment rights are at stake, we believe the proper solution is to require nonmembers to pay service fees into an escrow account. While we recognize this works somewhat of a hardship on the union because temporarily it will be unable to collect even the portion of service fees to which it is entitled, the hardship is outweighed by the possibility that First Amendment rights will be violated.
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> It is tempting to merely stay the lower court action pending exhaustion of [AFSCME's intra-union rebate appeals procedure]. However where fundamental constitutional rights are asserted, the "exhaustion of remedies" doctrine does not preclude recourse to Michigan courts. . . .

Ball v. City of Detroit, 84 Mich. App. 383, 393-94, 397, 269 N.W.2d 607, 612, 613 (1978) (citations omitted).

These holdings were followed by MERC just a few months later in *Garden City School District,* 1978 MERC Lab. Op. 1145, *reh'g denied,* 1978 MERC Lab. Op. 1282. As discussed already, *Garden City* applied PERA § 10(1)(c) and (2) in light of *Abood* and *Ball* to prohibit the discharge of objecting employees for failure to pay, except into escrow, fees which had not already been adjudicated by the Commission or a court to be constitutionally permissible. App. G, *infra,* pp. 65a-67a, 68a-69a.

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amount is adjudicated. ***Robbinsdale Educ. Ass'n v. Robbinsdale Fed'n of Teachers Local 872,*** 307 Minn. 96, 100-09, 239 N.W.2d 437, 440-45, ***vacated and remanded for further consideration sub nom. Threlkeld v. Robbinsdale Fed'n of Teachers, Local 872,*** 429 U.S. 880 (1976), ***reinstated,*** 316 N.W.2d 551 (Minn.), ***appeal dismissed,*** 103 S. Ct. 24 (1982).

Ball was followed by some courts in other jurisdictions.[9] But other courts saw no constitutional defect in applying statutes to permit unions to obtain forced loans to subsidize their political, ideological and other non-collective bargaining activities.[10] The instant case, however, represents the most extreme position taken by any of the courts since here objecting nonmembers must pay all disputed fees to the union *and* exhaust intra-union rebate procedures before seeking administrative relief.

In short, *Abood* and these conflicting lower-court decisions show that this case presents a substantial federal constitutional question which this Court had not totally resolved prior to *Ellis*. Furthermore, it is now clear that the Court of Appeals' decision upholding the constitutionality, as applied, of PERA is in direct conflict with *Ellis*.

This case cannot be distinguished from *Ellis*. A court-determined post-spending refund is no less a forced loan than one administered by a union. The escrow remedy requested and instituted by Ms. D'Alleva is one of the acceptable alternatives specifically recognized by *Ellis*. Indeed, the only significant difference between this case and *Ellis* is

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[9] *Beck v. Communications Workers of America*, 468 F. Supp. 87, 91 (D. Md. 1979); *School Comm. v. Greenfield Educ. Ass'n*, 385 Mass. 70, 83-85, 431 N.E.2d 180, 189 (1982); *see Perry v. Local 2569*, 708 F.2d 1258, 1261-63 (7th Cir. 1983); *Galda v. Bloustein*, 686 F.2d 159, 167-69 (3d Cir. 1982); *Schneider v. Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963, 976-77 (D.P.R. 1983).

[10] Cases holding that a post-spending refund is an adequate remedy included *Ellis v. Railway Clerks*, 685 F.2d 1065, 1069-70 (9th Cir. 1982), *rev'd in pertinent part*, —— U.S. ——, 104 S. Ct. 1883 (1984), and the decisions of the Michigan Court of Appeals in *White Cloud Educ. Ass'n v. Board of Educ.*, 101 Mich. App. 309, 317-19, 300 N.W.2d 551, 554-55 (1980), *Jurisdictional Statement filed sub nom. Jibson v. White Cloud Educ. Ass'n*, 52 U.S.L.W. 3846 (U.S. May 7, 1984) (No. 83-1816); and the instant case.

that the rights being violated here are wholly constitutional in nature, not statutory, because PERA itself " 'sanctions the use of non-union members' fees for purposes other than collective bargaining'." *Abood,* 431 U.S. at 232, *quoting Abood v. Detroit Bd. of Educ.,* 60 Mich. App. 92, 99, 230 N.W.2d 322, 326 (1975). As the Court said in *Abood,* 431 U.S. at 240, "that difference surely could not justify any lesser relief in this case."

The fact that the decisions below required Ms. D'Alleva to pay a fee which the union had unilaterally reduced by 6.6% does not provide a basis for distinguishing this case from *Ellis* for several reasons.

First, the Court of Appeals did not consider the unilateral reduction relevant to either the escrow or exhaustion issues.[11] Rather, the court "adopt[ed] the conclusion of *White Cloud* . . . that escrow accounts are *not* permitted, as more fully reflective of the United States Supreme Court's decision in *Abood.*" App. A, *infra,* pp. 5a-6a (emphasis in original, citation omitted). In that case, the Michigan Court of Appeals construed PERA to require the payment of fees equal to *full* union dues as a prerequisite to litigating the constitutionality of their amount in court.[12]

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[11] MERC has now shown that it too does not consider a reduction in the demanded fee to be relevant to the issues herein. In *Michigan Nurses Ass'n,* 1983 MERC Lab. Op. 334—a case decided after *Kempner*—the objecting employee had also refused to pay the disputed fee directly to the union and exhaust intra-union rebate procedures. The Commission dismissed the charge even though the union, based on its unsupported assertion that all fees were used for the "economic and general welfare of the professional Registered Nurse," *id.* at 338, had made *no* reduction in the dues-equivalent fee.

[12] In the instant case, App. A, *infra,* p. 6a, the Court of Appeals also based its rejection of escrow on the "alternative remedies" set

Second, even if the union's unilateral reduction were relevant to the escrow issue, the Court of Appeals' application of the statute herein would still be the "pure rebate approach" condemned in *Ellis*. MERC ordered Ms. D'Alleva to pay the union 93.4% of union dues to avoid discharge from employment. This 6.6% reduction is an admission by the union that it would have used at least that much of Ms. D'Alleva's fee for impermissible purposes had she not previously refused to pay the total amount originally demanded. Nevertheless, the chargeability of the remaining 93.4% is still disputed! Under the decisions below, the union would still have the use of the disputed 93.4% for an undetermined duration,[13] and Ms. D'Alleva's only remedy would be an eventual refund. Like the payment of interest discussed in Ellis, the union's concession reduces the harm; but "[e]ven then the union obtains an

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forth in *White Cloud*, 101 Mich. App. at 319, 300 N.W.2d at 555 (declaratory judgment action to be brought by objecting employees). An appeal of *White Cloud* is presently before this Court *sub nom. Jibson v. White Cloud Educ. Ass'n*, 52 U.S.L.W. 3846 (Jurisdictional Statement filed May 7, 1984) (No. 83-1816). Rather than reargue the merits of the alternative remedy suggested in that decision, appellant Kempner adopts the position taken by appellant Jibson in his Jurisdictional Statement, pp. 14-16.

[13] The interim period under the scheme sanctioned herein is even longer than the one-year period in *Ellis*. Here, PERA has been applied in such a way that a union can make an advance reduction, or no reduction at all, "us[ing] its own definition of ideological or political purpose." App. A, *infra*, p. 3a, *quoting* App. B, *infra*, p. 13a. Then, the objecting employee must pay the "reduced" fee *AND* "exhaust the internal appeal procedures provided by the Union for challenging its allocation of the fee before requesting allocation from the Commission." App. A, *infra*, p. 7a, *quoting* App. B, *infra*, p. 14a. Just meeting this exhaustion requirement could take two or three years. App. F, *infra*, pp. 51a-53a.

involuntary loan for purposes to which the employee objects." 104 S. Ct. at 1890.[14]

Third and perhaps most important, the "advance reduction of dues" to which this court referred in *Ellis, id.*, as an "acceptable alternative" to the rebate approach, was not a sham union-determined reduction.[15] Rather, it was

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[14] In this case, it is certain that the union's unilateral fee reduction of 6.6% would have still allowed it to "borrow" Ms. D'Alleva's funds for improper purposes. The union's internal rebate limits the reduction to only "*partisan* political or ideological purposes" and thus, *inter alia*, the union's organizing and non-bargaining unit litigation costs were not included in the reduction. *See* App. F, *infra*, p. 51a.

[15] In discussing the validity of the rebate approach, the Court in *Ellis* cited *Greenfield, supra*, and *Robinson v. New Jersey*, 547 F. Supp. 1297 (D.N.J. 1982), *rev'd*, —— F.2d —— (3rd Cir. Aug. 6, 1984), as examples of decisions "holding or suggesting that such a scheme does not adequately protect the rights of dissenting employees." 104 S. Ct. at 1890 n.7. This is significant because in both cases, as here, the fee demanded by the union was an amount equal to union dues, less a union-determined reduction.

In *Greenfield*, the union made a unilateral reduction of 3.2%, but the Massachusetts Supreme Court held that

> [a]ny presumption of validity [of the reduced fee] prior to a determination of whether the fee comports with [state law] would . . . likely run afoul of the constitutional requirement that the organization bear the burden of proving the assessed fee legitimate.

385 Mass. at 73, 78 n.3, 431 N.E.2d at 183, 185 n.3 (citations omitted).

In *Robinson*, 547 F. Supp. at 1305, 1309, the unions reduced the compulsory fees to a statutorily mandated figure of 85%, and then asserted that this limitation adequately protected the rights of dissenting employees. The District Court rejected his argument, stating:

> To assume that [non-collective bargaining] expenses and political, ideological and lobbying expenses of each of those

the "more precise advance reduction scheme" first suggested by the Court in *Allen*, 373 U.S. at 122, "where [the court] described a *'practical decree' comprising* a refund of exacted funds in the proportion that political expenditures bore to total union expenditures and *the reduction of future exactions by the same proportion.*" *Ellis*, 104 S. Ct. at 1889-90 (emphasis added).[16] Unlike a reduction computed unilaterally by the union *before* trial, an advance reduction of future fees based on a determination by a court or administrative agency is "a way of preventing compulsory subsidization of ideological activity by employees who object thereto," that accords with due process. *Abood*, 431 U.S. at 237.

> organizations total 15% or less of pertinent total expenses requires an exercise of faith which should not be required of [non-members].

Id. at 1319. The rationale of these rulings clearly applies with equal force in the instant case.

[16] In light of *Ellis*, it is now clear that a reduction in fees based only on a union's political expenditures would be inadequate.

> [I]n *Allen*, . . . we held that the union bears the burden of proving what proportion of expenditures that went to activities that *could be charged* to dissenters . . .
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> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the *duties of an exclusive bargaining representative in dealing with the employer on labor-management issues.* Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining agreement and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representatives of the employees in the bargaining unit.

Ellis, 104 S. Ct. at 1892, 1897 n.15 (emphasis added).

The Court of Appeals also complained that it was unduly burdensome for the union to be denied access to the disputed fees during this interim period. App. A, *infra,* p. 6a. However, this argument of "administrative convenience" was expressly rejected in *Ellis,* 104 S. Ct. at 1890. "[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of [constitutional rights]." *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 647 (1974). Moreover, escrow "place[s] only the slightest additional burden, if any, on the union," *Ellis, id.;* and,

> is [a] temporary measure designed to ensure nonmembers pay their service fees . . . and to ensure the union will have prompt access to the funds to which it is entitled after a judicial determination.

Ball, 84 Mich. App. at 397, 269 N.W.2d at 613.

Based on the instant facts and the discussion above, it is clear that the Court of Appeals has applied PERA in an unconstitutional manner. While it is not necessarily appellant's responsibility to outline how the statute could be applied consistent with the Constitution, it is noted that the procedures set forth in *Ball* and *Garden City* (which represented the law in Michigan from 1978 until at least 1980) are completely in harmony with this Court's decision in *Ellis.* Where, as here, the union concedes that it engages in some "rebatable" spending but a dispute exists over the remaining fee which has not yet been adjudicated by a court or administrative agency, advance reduction of the amount conceded *and* escrow of the remainder is the appropriate solution. Finally, if an objecting employee is entitled to escrow relief but the union nevertheless attempts to cause his/her discharge for failure to pay the disputed fee, except into escrow, the union's action clearly constitutes an unfair labor practice under PERA § 10(3)(a)(i) and (3)(b). *See* App. G, *infra,* pp. 68a-70a.

Question II

In addition to abridging First Amendment rights, the exhaustion requirement imposed herein raises other substantial federal questions.

1. The Court of Appeals relied on language in *Abood,* 431 U.S. at 242 and *Allen,* 373 U.S. at 122, to support MERC's exhaustion requirements, App. A, *infra,* pp. 7a-8a; but those decisions never suggested that objecting employees could be *forced* to utilize intra-union rebate procedures.

In *Abood,* this Court only suggested "the *voluntary utilization* by the par*ties* of [intra-union rebate procedures] as a *possible means of settling the dispute.*" *Id.* at 242 (emphasis added, footnote omitted). The Court specifically noted that "[w]e express no view as to the constitutional sufficiency of the internal remedy." *Id.* at 242 n.45; *see also, id.* at 244 (Stevens, J., concurring) (quoted *supra* at 12). In fact, *Abood* held that objecting nonmembers *must have* "an opportunity to establish their right to appropriate relief. . . ." *Id.* at 242.

In *Allen,* this Court "suggested that it would be highly desirable for unions to adopt a 'voluntary plan by which dissenters would be afforded an internal union remedy' ". *Abood,* 431 U.S. at 240 (quoting *Allen,* 373 U.S. at 122). That suggestion was proferred simply "to remind *the parties* of the availability of more practical *alternatives to litigation* * * *," not as a rule of law binding upon the lower courts in that case—or upon the courts in any other case. 373 U.S. at 124 (emphasis added). Indeed, *Allen* declared that "[t]he courts will not shrink from affording what remedies they may with due regard to the legitimate interests of all parties * * *." *Id.*

Ellis, 104 S. Ct. at 1890, now confirms that the comments in *Abood* and *Allen* suggesting the possible use of intra-union rebate schemes were not holdings that the doors of

the courts and administrative agencies should be closed to objectors if they choose not to use these rebate schemes and that the *forced* utilization of these schemes is constitutional. Thus, the Court of Appeals erroneously concluded that in those earlier decisions this Court had approved such schemes as a satisfactory means of protecting the constitutional rights of objecting employees.[17]

2. Requiring Ms. D'Alleva, who has never belonged to the union, to submit to a non-governmental, intra-union rebate scheme as a condition of exercising her First Amendment right not to subsidize the union's political, ideological and other non-collective bargaining activities, is itself forced association which cannot be justified by any compelling governmental interest. *Compare Abood* (compulsory financial support); *Elrod v. Burns,* 427 U.S. 347 (1976) (compulsory financial support or ostensible membership); and *Branti v. Finkel,* 445 U.S. 507 (1980) (compulsory "sponsorship"). In fact, this Court has noted that "[a]ny coercion used to discourage, retard, or defeat . . . access [to administrative proceedings] is beyond the legitimate interests of a labor organization." *NLRB v. Industrial Union of Marine and Shipbuilding Workers,* 391 U.S. 418, 424 (1968).

An intra-union rebate scheme clearly subjugates objecting employees to "tribunals" composed of or appointed by members of a labor organization, a characteristic of union

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[17] The Court of Appeals panel in *Ball* had also considered the comments in *Abood* and *Allen,* but correctly ruled that until there has been "an initial judicial determination and subsequent fee reductions," objecting employees cannot be required to exhaust intra-union rebate schemes. *Ball,* 84 Mich. App. at 393-394, 396-397, 269 N.W.2d at 611-613. In addition, the highest court of Massachusetts agreed that *Ball* correctly "refused to force dissenting teachers [*sic*] to resort to the internal union procedure in the first instance." *Greenfield,* 385 Mass. at 82-83, 431 N.W.2d at 188.

membership. *See, e.g., Harris v. Detroit Typographical Union,* 144 Mich. 422, 108 N.W. 362 (1906). Thus, objectors are being told that if they want to claim their constitutional right not to subsidize non-collective bargaining activities, they must surrender their constitutional right not to associate with others, or *vice versa. Abood* held that objecting employees do not have to make such a choice between constitutional rights:

> But in holding that as a *prerequisite to any relief* each appellant must indicate to the Union the *specific* expenditures to which he objects, the Court of Appeals ignored the clear holding of *Allen.* As in *Allen,* the employees here indicated in their pleadings that they opposed ideological expenditures of *any* sort that are unrelated to collective bargaining. To require greater specificity would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure.

Id., at 241-242 (first emphasis added; second and third emphasis in original; footnote omitted).

3. Requiring Ms. D'Alleva to exhaust intra-union rebate procedures as a prerequisite to securing government "protection" of her constitutional rights, unavoidably violates her right to due process of law under the Fourteenth Amendment because she must submit her dispute to the very organization which she claims is violating her rights.[18]

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[18] Significantly, objecting agency fee payors are the *only* unfair labor practice litigants in Michigan who are required to submit their charges to a third party before MERC will consider them. Refusing to apply federal deferral doctrines (*see Spielberg Mfg. Co.,* 112 NLRB 1080 (1955) and *Collyer Insulated Wire,* 192 *NLRB* 837 (1971)) to the public sector, the Michigan Supreme Court in *Detroit Firefighters Ass'n v. City of Detroit,* 408 Mich. 663, 293 N.W.2d 278 (1980) ruled that a party invoking MERC's jurisdiction has a statutory right to have his/her charge resolved

Such a requirement violates the most fundamental notions of fair play. "[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome". *In re Murchison,* 349 U.S. 133, 136 (1955).

By definition intra-union rebate schemes are inherently devoid of due process.

> The probability of bias is an initial reason to doubt the capability of union tribunals to resolve claims [against their union]. Union tribunals are not detached judicial bodies resolving disputes brought before them according to fixed rules and firm precedents. They are political bodies composed of union officials, and it is not unfair to say that they will consider the political and financial interests of the union foremost in their disposition of any * * * claim.

Fox & Sonenthal, *Section 301 and Exhaustion of Intra-Union Appeals: A Misbegotten Marriage,* 128 U. Pa. L. Rev., 989, 1005; *see id.,* at 1005-1006 & n.66; *see also* App. F, *infra,* pp. 51a-54a.

Ms. D'Alleva would inevitably receive an unfair determination from these union officers and executives, either deliberately or inadvertently as a result of their natural biases. The fact that the objecting employees may eventually get an impartial judicial or MERC hearing does not cure the original deficiency. As this Court stated in *Ward v. Village of Monroeville,* 409 U.S. 57, 61-62 (1972), one whose rights are being adjudicated "is entitled to a neutral and detached judge *in the first instance.*" (Emphasis added).

A scheme in which First Amendment rights are determined by "a 'captive organization' * * * named by the very group it is supposed to police" "does not safeguard

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quickly by the Commission, even when arbitration procedures have been agreed to by the parties or contain safeguards, clearly not present in intra-union rebate schemes. App. B, *infra,* p. 25a.

the rights of the dissidents." *Schneider,* 565 F. Supp. at 976. If statutory administrative remedies fail to provide due process where the selection of the members of the administrative tribunals is controlled, wholly or in part, by the labor organizations and/or employers with whom employees have a dispute, *see Glover v. St. Louis-San Francisco Ry.,* 393 U.S. 324, 330-331 (1969); *Steele v. Louisville & Nashville R.R.,* 323 U.S. 192, 206 (1944), then being forced to exhaust AFSCME's many-leveled rebate appeals scheme, *see* App F, *infra,* pp. 51a-54a, is a total abdication of due process.

4. The exhaustion requirements of MERC and the Court of Appeals deprive objecting employees of due process in yet another respect. The central issue in this case concerns the extent of, and proper method of protecting, the employees' *constitutional* right to be free from coerced political, ideological and non-collective bargaining conformity. *See Abood,* 431 U.S. at 232-242. Thus, the Michigan Court of Appeals held in *Ball:* "[W]here fundamental constitutional rights are asserted, the 'exhaustion of remedies' doctrine does not preclude recourse to Michigan courts." 84 Mich. App. at 394; 269 N.W.2d at 612.

The constitutional exception to the exhaustion doctrine was reaffirmed last term in *McDonald v. City of West Branch,* —— U.S. ——, 104 S. Ct. 1799 (1984). "Arbitration . . . cannot provide an adequate substitute for a judicial proceeding in protecting . . . statutory and constitutional rights. . . ." *Id.* at 1803;[19] *accord, Barrentine v. Arkansas-*

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[19] The Court listed four considerations that supported its ruling: (1) Arbitrators do not have the expertise to resolve constitutional and complex legal issues. *McDonald,* 104 S. Ct. at 1803. (2) Arbitrators do not have the authority to enforce constitutional or statutory rights. *Id.* (3) Since unions, as the exclusive bargaining representative, typically control the way the grievance is presented in an arbitration, the "employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was

Best Freight System, Inc., 450 U.S. 728 (1981) (minimum wage claims under Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (race discrimination claim under Title VII); and *Detroit Firefighters, supra* (unfair labor practice claim under PERA).[20]

If proceedings before an arbitrator selected by both employer and union are not the proper forum for resolution of an employee's statutory claims against the employer, *a fortiori* an employee cannot be required to resolve *constitutional* claims against a union in non-governmental forums selected unilaterally by that same union. *See McDonald*, 104 S. Ct. at 1803-04. All of the reasons given in *Alexander* and *McDonald* for the inappropriateness of arbitration ob-

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not in the union's best interest to press his claim vigorously." *Id.* at 1804. (4) Arbitral factfinding is not equivalent to judicial factfinding; and the necessary factfinding rights and procedures present in court, such as the rules of evidence, discovery, compulsory process, cross-examination and testimony under oath, are severely limited or unavailable in arbitration. *Id.*

[20] In this regard *see also Clayton v. Auto Workers*, 451 U.S. 679 (1981), which involved a fair representation claim against the union brought under § 301, Labor Management Relations Act; and *Marine Workers*, 391 U.S. at 425, where the Court ruled that a union *member* did not have to exhaust his intra-union remedies before filing a charge with the National Labor Relations Board, since public policy issues are not the proper subject of internal proceedings:

> Those issues cannot be fully explored in an internal union proceeding. There cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of the complex problems concerning employer, union, and employee member. *If the member becomes exhausted,* instead of the remedies the issues of public policy are never reached and an airing of the grievance never had.

Id. (Emphasis added.)

viously apply more strongly to AFSCME's internal rebate proceedings and need not be repeated.

The inherent vice of any intra-union rebate scheme which relegates employees to a post-spending remedy is its cession to unions of the power irreparably to compromise constitutional freedoms in advance—and thus in a manner subversive—of meaningful judicial review.

The reasons for insisting upon strict procedural standards are particularly compelling in cases involving political speech and association. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 162-63 (1969) (Harlan, J., concurring); *Carroll v. President and Comm'rs of Princess Anne,* 393 U.S. 175, 198 (1968). Because *Ellis* holds that there are alternative agency shop procedural systems, such as interim escrow, which are less restrictive of these First Amendment rights than those adopted by MERC and the Court of Appeals herein, PERA § 10(1)(c) and (2) is therefore unconstitutional as applied.

CONCLUSION

The questions presented are important ones involving fundamental rights protected by the First and Fourteenth Amendments. The Court of Appeals' decision was rendered before *Ellis,* and its analysis and application of this Court's precedents reached the same erroneous conclusions that were reversed in *Ellis.* The result below is also contrary to *Abood.* The conflict in the federal and state decisions since *Abood,* noted above, indicates a need for additional guidance from this Court on the proper treatment of the constitutional rights involved herein. It is also clear that MERC and the Michigan Court of Appeals have not protected the important rights of public employees. Only this Court can now protect them from the constitutional injury which has resulted and will continue unless the decision below is overturned.

For the foregoing reasons, the Court should summarily reverse the decision below and declare PERA § 10(1)(c) and (2) unconstitutional as applied. Further, the Court should remand the case with directions that the dismissal of the unfair labor practice charge be vacated, the charge be considered and an appropriate remedial order be issued by MERC, consistent with its constitutional application of PERA in *Garden City*. In the alternative, the Court should note probable jurisdiction of the appeal and set it down for plenary briefing and argument.

Respectfully submitted,

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September 6, 1984

APPENDIX A

Opinion & Judgment of the Michigan Court of Appeals

STATE OF MICHIGAN
COURT OF APPEALS

DAVID E. KEMPNER,
Plaintiff-Appellant,

-v-

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY, TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO, and METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,

June 8, 1983

Docket # 63491

Defendants-Appellees.

[as officially reported in 126 Mich. App. 452]

BEFORE: T. M. Burns, P.J., and R. M. Maher, and H. Hood, JJ.

PER CURIAM

Plaintiff appeals from an order of the Michigan Employment Relations Commission (MERC) dismissing an unfair labor practice charge.

Christine D'Alleva was an employee of the City of Dearborn. During the period in which she was employed, the collective bargaining agreement between defendant unions (hereinafter union) and the City of Dearborn re-

quired members of a bargaining unit to pay either union dues or equivalent service fees as a condition of continued employment, pursuant to § 10(1)(c) of the public employment relations act (PERA), MCL 423.210(1)(c); MSA 17.455(10)(1)(c).

Ms. D'Alleva did not fulfill either alternative obligation. Consequently, the union informed her of her failure to comply with MCL 423.210(1)(c); MSA 17.455(10)(1)(c). As was her prerogative, Ms. D'Alleva requested a breakdown of the use made by the union of the service fees collected. The union answered her request, but she declined to use the union's internal rebate procedures.

When Ms. D'Alleva persisted in her refusal to pay, the union requested the city to terminate her employment. Eventually, the union offered to accept a service fee reduced by the approximate amount (6%) which the union acknowledged was used for political or ideological purposes unrelated to collective bargaining. Ms. D'Alleva still refused to make any payment, except into an escrow account pending an adjudication as to the proper allocation of the service fee. Thereafter, plaintiff filed an unfair labor practice charge on behalf of Ms. D'Alleva, alleging that the union had unlawfully demanded her discharge for failure to pay agency shop fees because the union had not established by an adjudication that portion of the agency fee to which it was constitutionally entitled under *Abood* v *Detroit Bd of Ed,* 431 US 209; 97 S Ct 1782; 52 L Ed 2d 201 (1977).

The hearing officer recommended dismissal of the charge and MERC affirmed. The decision and order of MERC stated:

> "The Administrative Law Judge held that in order for a Union to lawfully demand the discharge of a non-member for failure to pay an agency fee the Union must, after the non-member has given notice to the

> Union of the fact of her objection, provide the objecting non-member with a figure allowing him to reduce the amount of his monthly fee by the percentage of the Union's annual budget spent for ideological or political purposes unrelated to collective bargaining. In making this computation the Union must use its own definition of ideological or political purpose as long as that definition is a good faith application of current case law. After receiving this information from the Union, the objecting non-member must commence paying a reduced fee, consisting of the normal agency fee less the percentage given him by the Union. Until the Union provides the objecting non-member with this figure, he need pay nothing * * *. If the objecting non-member refuses to pay the reduced fee after the Union has provided him with the figure discussed above, the Union may then demand his discharge. The objecting non-member may, of course, if dissatisfied with the figure given by the Union, pursue other remedies to obtain a final allocation of the fee. He must pay the reduced fee pending this litigation, however."

Finding that Ms. D'Alleva had declined the option of paying the fee reduced by the amount the union claimed to have spent on ideological and political activities, and that she had refused to pay any portion of her fee except into escrow, MERC agreed with the hearing officer's conclusion "that Respondents' continuing demand for her discharge was not unlawful under PERA." MERC further agreed with the hearing officer's dismissal of the charge because Ms. D'Alleva refused to pay the adjusted fee pending exhaustion of the internal rebate and appeals procedures provided by the union.

Plaintiff appeals as of right alleging several legal errors by MERC in its construction of MCL 423.210(1)(c); MSA 17.455(10)(1)(c) which states, in pertinent part:

"It shall be unlawful for a public employer or an officer or agent of a public employer * * * (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization: Provided further, That nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in section 11 to require as a condition of employment that all employees in the bargaining unit pay to the exclusive representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative."

I

Plaintiff first contends that MERC used the wrong standard to determine the proper percentage of the gross agency shop fee that could be extracted from an objecting employee without violating his First Amendment rights. MERC, however, specifically declined to determine what percentage of the fee the union could permissibly collect under prevailing constitutional law. Such a determination would be premature, MERC ruled, because the plaintiff had not yet exhausted the union's internal appeal procedures for challenging the union's allocation of the fee. Thus, any standard characterized by MERC as the proper one to be applied was not essential to its decision and not reviewable by this Court.

Nevertheless, we wish to comment briefly on the issue raised by plaintiff. The standard plaintiff attributes to MERC is that a union may collect fees supporting union activities except "ideological activities unrelated to collective bargaining." This standard, the plaintiff argues, is broader than the one endorsed by *Abood*. According to plaintiff, *Abood* allows only the use of agency service fees "to finance expenditures * * * for collective bargaining, con-

tract administration, and grievance adjustment." 431 US 225-226.

We believe that plaintiff has read *Abood* too narrowly. First, in the passage from *Abood* relied upon by plaintiff, the Court intended only to give three examples of union activities which employees may be compelled to support. The Court did not purport to limit this sort of activity to those three examples. Second, other language in *Abood* suggests that MERC's alleged interpretation of that case is correct. At one point in the opinion, the Court reflected: "There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and *ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.*" 431 US 236. (Emphasis supplied.) In this passage, the Court comes closer to announcing a standard than in the language seized upon by plaintiff. Thus, without subscribing to it ourselves, we believe the interpretation of *Abood* attributed to MERC by plaintiff is a reasonable construction of that case.[1]

II

Plaintiff further argues that MERC's refusal to permit Ms. D'Alleva to tender the service fee into an escrow account pending a determination of the precise amount chargeable resulted in, at the least, a temporary infringement of her First Amendment rights.

The propriety of an escrow remedy under these circumstances is the subject of a conflict between different panels of this Court. *Compare: White Cloud Education Ass'n* v *White Cloud Bd of Ed,* 101 Mich App 309; 300 NW2d 551 (1980), and *Ball* v *Detroit,* 84 Mich App 383; 269 NW2d 607 (1978). In *Ball, supra,* an escrow account was permitted; in *White Cloud, supra,* it was not.[2]

We adopt the conclusion of *White Cloud, supra,* that escrow accounts are *not* permitted, as more fully reflective

of the United States Supreme Court's decision in *Abood.* Citing its own precedents of *International Ass'n of Machinists* v *Street,* 367 US 740; 81 S Ct 1784; 6 L Ed 2d 1141 (1961), and *Brotherhood of Railway & Steamship Clerks* v *Allen,* 373 US 113; 83 S Ct 1158; 10 L Ed 2d 235 (1963), the Supreme Court concluded:

> "In determining what remedy will be appropriate if the appellants prove their allegations the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities.*" 431 US 237 (Emphasis added.)

We hold that an escrow remedy unduly restricts "the union's ability to require every employee to contribute to the cost of collective bargaining activities", especially in view of the alternative remedies set forth in *White Cloud, supra,* for, although Ms. D'Alleva would part with her money, the union would not receive it. The union would nevertheless be obligated to fulfill its ongoing statutory responsibilities to the entire bargaining unit—including the charging party-appellant—without corresponding financial sustenance.

Furthermore, in *Street, supra,* and *Allen, supra,* the United States Supreme Court emphasized that there should be no *temporary* injunctive relief which interferes with the flow of funds to the union. In *Street, supra,* the Court held: "Nor would it be proper to issue an interim or temporary blanket injunction of this character pending a final adjudication." 367 US 772. Similarly, in *Allen, supra,* the Supreme Court ruled:

> "It also follows from *Street* that the Superior Court erred in granting respondent's interim relief against compliance with financial obligations imposed by the

Agreement. As a result of this relief none of the respondents has taken any steps toward compliance since the suit was instituted. We think that lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, *dissenting employees* (at least in the absence of special circumstances not shown here) *can be entitled to no relief until final judgment in their favor is entered.*" 373 US 120. (Emphasis added.)

III

Plaintiff also attacks MERC's exhaustion of remedies requirement. MERC held that an "objecting non-member must in this case exhaust the internal appeal procedures provided by [the Union] for challenging its allocation of the fee before requesting allocation from the Commission", Slip Op, p 3. Plaintiff argues that the exhaustion requirement is unconstitutional because it forces nonmembers to defer vindication of constitutional claims to internal processes of an organization to which they do not belong.

We do not agree. Plaintiff's arguments overlook the *encouragement* given to such processes by the United States Supreme Court. For example, in *Brotherhood of Railway & Steamship Clerks* v *Allen, supra,* the Supreme Court held:

> "The difficulties in judicially administered relief, although not insurmountable * * *, should, we think, encourage petitioner unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy." 373 US 122.

That suggestion in *Allen, supra,* was echoed by the United States Supreme Court in *Abood, supra:*

> "In view of the newly adopted Union internal remedy, it may be appropriate under Michigan law, even

> if not strictly required by any doctrine of exhaustion of remedies, to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute." 431 US 242.

In light of those expressions by the United States Supreme Court, we are compelled to conclude that a required exhaustion of internal union remedies by nonmembers as to agency fee protests is constitutionally permissible.[3] Agency fee objections are, by definition made by nonmembers, and their objections as public employees are invariably asserted in constitutional terms. Yet, it was precisely with those considerations in mind that the United States Supreme Court encouraged affected unions to provide internal review procedures.

IV

Finally, plaintiff submits that MERC "applied PERA in an unconstitutional manner by sanctioning the discharge of objecting employees for failing to pay, except into escrow, an agency shop fee which has not been adjudicated before [MERC] or a court of general jurisdiction to be the constitutionally permissible fee."

This contention merely restates plaintiff's previous arguments and is without merit. The decision below manifests a faithful adherence to the balancing process exemplified in *Abood*. See, also, MCL 423.210(2); MSA 17.455(10)(2).

Affirmed. No costs, a question of statutory construction being involved.

[1] It should be noted that the United States Supreme Court's decision in *Abood* appears to be based, in part, on *Brotherhood of Railway & Steamship Clerks* v *Allen*, 373 US 113; 83 S Ct 1158; 10 L Ed 2d 235 (1963) and *Railway Employees' Dep't* v *Hanson*, 351 US 225; 76 S Ct 714; 100 L Ed 1112 (1956).

Faced with a similar situation, the Ninth Circuit Court of Appeals recently concluded, "Based on our reading of *Hanson, Allen* and *Abood*, however, we believe that the relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining. This formulation respects and protects dissenters' rights but does not needlessly weaken the union, whose viability is necessary to secure and maintain industrial peace." *Ellis* v *Brotherhood of Railway & Steamship Clerks*, 685 F2d 1065, 1072 (CA 9, 1982). Cf. *White Cloud Education Ass'n* v *White Cloud Bd of Ed*, 101 Mich App 309, 318-319; 300 NW2d 551 (1980); *Eastern Michigan University Chapter of the American Ass'n of University Professors* v *Morgan*, 100 Mich App 219, 230; 298 NW2d 886 (1980), *lv den* 411 Mich 955 (1981).

In any event, until an allocation is actually made, it is difficult to perceive how Ms. D'Alleva is prejudiced—regardless of the standard used.

[2] In *Ball, supra*, p 397, this Court held:

> "The Supreme Court concluded the Michigan Court of Appeals was correct in denying the, '*broad* injunctive relief requested.' *Abood, supra*, P 241 (emphasis supplied). However we agree with plaintiffs that allowing the union the use of funds prior to a judicial determination subjects nonmembers to the risk that their fees may be used, even temporarily, for activities to which they are opposed. Because fundamental First Amendment rights are at stake, we believe the proper solution is to require nonmembers to pay service fees into an escrow account. While we recognize this works somewhat of a hardship on the union because temporarily it will be unable to collect even the portion of service fees to which it is entitled, that hardship is outweighed by the possibility that First Amendment rights will be violated."

On the other hand, in *White Cloud, supra*, pp 318-319, this Court cited *Ball* and concluded:

"Our ruling in *Ball* clearly accords paramount status to the employee's First Amendment rights vis-a-vis the union's right to that portion of the fee which will be used for collective bargaining, contract administration and grievance adjustment. While we continue to adhere to that principle, we now believe that the employee's First Amendment rights can be adequately safeguarded if the disputed fee is paid to the union and the employee immediately files suit for declaratory judgment under GCR 1963, 521. That court rule provides for judicial declaration of 'the rights and other legal relations of * * * interested part[ies]' and authorizes the circuit court to 'order a speedy hearing of an action for declaratory relief' and to 'advance [such hearing] on the calendar'. In this manner, while the employee can quickly move for a resolution of the issue and a vindication of his constitutional rights, the union is not crippled by nonaccess to that portion of the fee which will be used for collective bargaining, contract administration and grievance adjustment. In the context of such an action for declaratory judgment the union shall have the burden of establishing the proportion of the agency shop fee which is dedicated to uses to which the employee does not object. *Railway Clerks* v *Allen*, 373 US 113, 122; 83 S Ct 1158, 1163; 10 L Ed 2d 235, 241 (1963)."

[3] To the extent that *Ball* suggests otherwise, we respectfully decline to follow that holding. See, generally, *Eastern Michigan University Chapter of the American Ass'n of University Professors* v *Morgan, supra*, p. 226:

"However, in view of the well-established authority of a bargaining agent to bind all members of the bargaining unit, the significance of defendant's nonunion status is unpersuasive. Nonunion members are as much 'parties' to a bargaining agreement as union members, with the same rights and duties. In fact, they *may not* be treated differently. *Vaca* v *Sipes*, 386 US 171; 87 S Ct 903; 17 L Ed 2d 842 (1967)."

See also, *Detroit Bd of Ed* v *Parks*, 98 Mich App 22; 296 NW2d 815 (1980).

APPENDIX B

Decision and Orders of the Michigan Employment Relations Commission

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY, TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO, AND METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,

Respondents

Case No. CU79 L-60

- and -

DAVID E. KEMPNER, An Individual,

Charging Party

[identification of attorneys omitted]

[as officially reported in 1982 MERC Lab. Op. 287]

DECISION AND ORDER

On February 28, 1981, A[dministrative] L[aw] J[udge] Shlomo Sperka issued a Decision and Recommended Order in the above-captioned case. The charge in this case alleged that Respondent Unions had unlawfully demanded the discharge of Christine D'Alleva for her failure to pay agency shop fees, despite Respondents' failure to establish, by an adjudication, that portion of the agency fee to which they are constitutionally entitled under *Abood* v *Detroit Board of Education,* 431 US 209 (1977). The ALJ recommended dismissal of the charge.

The Decision and Recommended Order was served on the interested parties in accord with Section 16(b) of Act 336 of the Public Acts of 1947, as amended, MCLA 423.206, MSA 17.455(16), hereinafter referred to as PERA. Thereafter, Charging Party filed timely exceptions to this recommendation and to the findings of the ALJ upon which the recommendation was based.

As noted by the ALJ, Section 10(2) of PERA specifically permits "agency shop" agreements. A Union may lawfully demand the discharge of a nonmember, covered by such an agreement, who refuses to pay an agency shop fee. In *Abood, supra,* the Supreme Court ruled that it was constitutionally impermissible for an employee to be required to pay that portion of his fee used by the Union for political or ideological purposes unrelated to collective bargaining. In this case, Charging Party argues that Respondents may not demand the discharge of an objecting nonmember who refuses to pay the fee absent an adjudication, by the Courts or by this Commission, to establish the portion of the fee to which Respondents are entitled under *Abood.* Charging Party also argues that pending this adjudication an objecting nonmember should be allowed to pay the entire amount of his fee into an escrow account. Finally, Respondents and Charging Party disagree over whether an objecting nonmember should be required to utilize the internal rebate and appeals procedures provided by Respondents before filing charges with the Commission to obtain an adjudication of the fee. We have reviewed the exceptions in this case. We affirm the ALJ and adopt his recommendations for disposition of this charge.

The ALJ held that in order for a Union to lawfully demand the discharge of a nonmember for failure to pay an agency fee the Union must, after the nonmember has given notice to the Union of the fact of her objection, provide the objecting nonmember with a figure allowing him to reduce the amount of his monthly fee by the percentage of the Union's annual budget spent for ideological or politi-

cal purposes unrelated to collective bargaining. In making this computation the Union may use its own definition of ideological or political purpose as long as that definition is a good faith application of current case law. After receiving this information from the Union, the objecting nonmember must commence paying a reduced fee, consisting of the normal agency fee less the percentage given him by the Union. Until the Union provides the objecting nonmember with this figure, he need pay nothing. The requirement that the objecting nonmember be allowed to pay a reduced fee was imposed by the ALJ to ensure that the nonmember need not pay, even temporarily, monies to which the Union is not entitled. If the objecting nonmember refuses to pay the reduced fee after the Union has provided him with the figure discussed above, the Union may then demand his discharge. The objecting nonmember may, of course, if dissatisfied with the figure given by the Union, pursue other remedies to obtain a final allocation of the fee. He must pay the reduced fee pending this litigation, however.

Christine D'Alleva, on whose behalf this charge was filed, was offered the option of paying her fee reduced by six percent (6%), roughly the percentage Respondents claim to spend on ideological and political activities. D'Alleva, however, refused to pay any portion of her fee, except into escrow. We adopt therefore, the ALJ's conclusion that Respondents' continuing demand for her discharge was not unlawful under PERA. We, therefore, concur in his dismissal of this aspect of her charge.

Charging Party also sought, by means of this charge, to obtain a determination from this Commission as to the exact amount of the fee to which Respondents are entitled. We have previously suggested, in *Garden City School District,* 1978 MERC Lab Op 1145, that we would make such allocations under appropriate circumstances. We hold with the ALJ, however, that the objecting nonmember must in this case exhaust the internal appeal procedures provided

by Respondents for challenging its allocation of the fee before requesting allocation from the Commission. As D'Alleva has apparently made no effort to utilize these procedures, we also dismiss her request for an allocation of the fee. If D'Alleva can demonstrate that she, or another objecting nonmember, has exhausted the internal union appeals procedure, the charge may be refiled.

After careful review of the constitutional and policy arguments advanced by the parties, we are of the view that the position adopted by the ALJ reflects the current law of this state. Therefore, we affirm his findings and adopt his recommendation, pending further clarification by the Courts of the constitutional issues presented by this case.

ORDER

Pursuant to Section 16 of the Act, the Commission hereby adopts the recommended order of the ALJ, and the charges and complaint are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Morris Milmet, CHAIRMAN

William M. Ellmann, MEMBER

Elaine Frost, MEMBER

DATED: March 11, 1982

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY, TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO, AND METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Respondents

Case No. CU79 L-60

- and -

DAVID E. KEMPNER,

Charging Party

[identification of attorneys omitted]

[as officially reported in 1982 MERC Lab. Op. 291]

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act, 1947 PA 336, as amended by 1965 PA 379, MCLA 423.210 and 423-216, MSA 17.455(10) and (16), hereafter referred to as PERA or the Act, this matter came on for hearing at Detroit, Michigan on February 4, 1980 before Shlomo Sperka, A[dministrative] L[aw] J[udge] for the Michigan Employment Relations Commission, hereafter referred to as the Commission. The proceeding was based upon a charge filed by David E. Kempner, an individual, alleging that Dearborn Local 2077, City of Dearborn Supervisory, Technical and Professional Employees, AFSCME, and Metropolitan Council 25, American Federation of State, County and Municipal Employees, AFL-CIO, hereafter referred to as Respondents or the Union,

has engaged in and is engaging in unfair labor practices within the meaning of Section 10 of PERA. The charge, although filed by David E. Kempner, relates to alleged discrimination against employee Christine D'Alleva. Since Kempner appeared and tried the case as attorney and D'Alleva is the moving party, she will be referred to hereafter, for convenience, as Charging Party or the employee.

At the hearing both parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to present evidence and arguments on the issues raised in the charge. Based upon the entire record in this proceeding, including the pleadings, transcript of testimony, exhibits, briefs and reply briefs filed by the parties between June 4 and October 17, 1980, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order:

FINDINGS OF FACT

The Charge:

The charge filed in this matter reads as follows:

> Since on or about November 28, 1979, the above-named labor organizations or its agents have restrained or coerced public employees in the exercise of the rights guaranteed in Section 9 of the Public Employment Relations Act (hereinafter PERA) MCLA 423.-209, and have caused or attempted to cause the City of Dearborn, a public employer within the meaning of PERA, to discriminate against Christine D'Alleva in violation of subdivision (c) of subsection (1) of Section 10 of PERA, MCLA 423.210(1)(c) by: Refusing and/or failing to cease and desist from causing or attempting to cause the City of Dearborn to discharge Christine D'Alleva for failing to pay, except into escrow, fees in lieu of dues which have not been ad-

judicated before the Michigan Employment Relations Commission or a court of general jurisdiction to be permissible fees under the Supreme Court's decision in *Abood v Detroit Board of Education,* 431 US 209 (1977).

Statement of Facts:

At the hearing the parties entered into a stipulation of facts which also included stipulation to certain exhibits. The stipulation of facts, as reflected in the record, is as follows:

1. Christine D'Alleva, hereinafter "D'Alleva" has been continuously employed by the City of Dearborn, hereinafter "the city," a public employer within the meaning of the Public Employment Relations Act, (hereinafter "Act") as a Publicist II in the Research and Information Department since August 23, 1976, her initial date of hire.

2. During the period of D'Alleva's employment with the city her job classification has been included within a bargaining unit represented by Local 2077, Council 25,[1] American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter, collectively, the "Union". AFSCME, Local 2077, and AFSCME, Council 25 are labor organizations within the meaning of the Act.

3. During the period of D'Alleva's employment with the city, three successive collective bargaining agree-

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[1] On or about March 9, 1978, all of the AFSCME councils in Michigan were merged into Respondent Labor Organization AFSCME Council 25. Prior to that date, Respondent Labor Organization Local 2077, City of Dearborn Supervisory and Technical and Professional Employees was affiliated with AFSCME Council 23. AFSCME Council 25 is the successor in interest to AFSCME Council 23.

ments have been in effect covering said bargaining unit. The effective dates of these agreements were/as follows: July 1, 1975 to June 30, 1977 (Joint Exhibit 1); July 1, 1977 to June 30, 1978 (Joint Exhibit 2) and July 1, 1978 to June 30, 1980 (Joint Exhibit 3).

4. D'Alleva has never paid union dues and/or agency shop service fees to the union either directly or indirectly.

5. On or about September 19, 1976, D'Alleva was orally advised by Jan Kornychuk (hereinafter "Kornychuk"), the then Local 2077 President, that under the agency shop clause then in effect, she had to join the union and pay union dues, or pay a service fee, that fee being identical to the union dues of $8.00 per month. Prior to Sept. 19, 1976 and subsequent to it, International AFSCME union had established a rebate procedure, as set forth in Joint Exhibit 4, which procedure has never been invoked by D'Alleva.

6. Following receipt of a letter from Kornychuk regarding said agency shop clause, D'Alleva orally requested a breakdown of the use made by the union of the service fees. In a protest letter to Kornychuk dated Oct. 22, 1976 (Joint Exhibit 6), she put this request in writing. Kornychuk responded to this protest letter in a letter to D'Alleva dated Dec. 28, 1976 (Joint Exhibit 7).

7. In a letter dated Feb. 17, 1977 to City Personnel Director Richard A. Cox (Joint Exhibit 8) Kornychuk requested "pro forma" D'Alleva's discharge. On the same day, memos from D'Alleva to Jackson and Jackson to Archer were circulated. (Joint Exhibit 8 and 8(a), respectively). On March 10, 1977 the City Civil Service Board voted to take no action on this request. (Joint Exhibit 9)—the relevant portion of official minutes of this meeting.

8. Subsequently, the City and the Union agreed to arbitrate the grievance (Joint Exhibit 10), and a hearing was held before George T. Roumell, Jr., on June 6, 1979. Arbitrator Roumell was mutually selected by the City and the Union, the parties to said arbitration proceeding. Arbitrator Roumell issued his opinion and award (Joint Exhibit 9) on August 28, 1979.

9. George M. Maurer, Jr. wrote a letter to Arbitrator Roumell, dated September 20, 1979, with copies to parties shown, (Joint Exhibit 12).

10. D'Alleva wrote a letter to Maurer, dated Sept. 29, 1979 (Joint Exhibit 13) with copies to parties shown.

11. Arbitrator Roumell held a second hearing in the above arbitration proceeding on October 31, 1979. At this hearing, various settlement offers were made and at the close of the hearing D'Alleva was given one week to decide whether to accept the Union's proposed settlement offer.

12. D'Alleva was granted a three-week extension of time in which to respond to said offer.

13. On November 28, 1979, D'Alleva sent a leter to Arbitrator Roumell, with copies to parties shown (Joint Exhibit 14).

14. Maurer responded to said escrow offer in a letter to Arbitrator Roumell, dated December 6, 1979 (Joint Exhibit 15) with copies to parties shown, in which he stated in closing:

> I urge that you come to a decision in this matter and not give this audacious young woman any further time to go around "doing her own thing."

15. Arbitrator Roumell issued a Supplemental Opinion and Award (Joint Exhibit 16), in the above arbitration proceeding on December 4, 1979.

16. On December 12, 1979, the instant charge was served upon the Respondent labor Organizations. Said charge was filed with MERC the following day. The Complaint and Notice of Hearing herein was issued on January 2, 1980.

17. In a letter to Maurer dated January 7, 1980, with copies to parties shown, (Joint Exhibit 17), D'Alleva's attorney proposed that an escrow agreement be entered into. (A copy of that agreement is Joint Exhibit 17(a).)

18. Neither respondent unions nor Mr. Maurer responded to the Escrow Agreement offer. Mr. Kempner and Mr. Chappell on January 22, 1980, opened an escrow account at City National Bank for D'Alleva and deposited the sum of $125.25 into said account. This figure represents a $100.00 down payment on the amount of service fees claimed to be due and owing by the Union from January 1, 1977 (the beginning of the month following the end of the 90-day agency shop "grace period") to December 31, 1979, plus $9.00 for January, 1980 service fees, plus $16.25 (one-twelfth of the remaining January 1, 1977 to December 31, 1979 service fees).

A copy of the Escrow Agreement is Joint Exhibit Number 18.

It was further stipulated that all letters were received by the persons to whom the letters indicated they were sent.

In addition to the stipulations, other evidence was presented in testimony. Charging party D'Alleva testified that she was approached about joining the Union by the local union president sometime after she was hired. She asked, several times, for information on allocation of the dues to various purposes. At the request of the union presi-

dent she put this inquiry in written form and on October 22, 1976, in a letter to him asked what part of the "service fee" is applied for collective bargaining and other specified uses. It was stipulated by the parties that this letter constitutes the objection to payment of service fees required under the governing case law. She received a letter about two months later which she considered an inadequate response. The letter referred her to internal procedures set up by Respondent for the purpose of receiving a rebate of that portion of the non-member service fee which did not relate to collective bargaining expenses. In a later conversation, the union president again asked for her membership. When she asked for more detail as to the application of the dues or service fees, he told her that no more information could be forthcoming to a nonmember and if she did not comply the union would file a grievance. A written demand for discharge of the Charging Party was sent to the employer on June 17, 1977. Charging Party was present at a meeting of the employer's civil service commission board which voted, in March 1977, to take no action on Respondent's demand. As a result of this, Respondent filed a grievance against the employer and also notified Charging Party that the grievance had been filed. The grievance was filed on June 30, 1977.

Charging Party next heard of this entire matter two years later when, in May 1979, she was told by a representative of her employer that an arbitration hearing had been scheduled for June 6, 1979. The arbitration award indicates that Charging Party was present at the hearing. On August 28, 1979, the arbitrator issued an award finding, in essence, that Charging Party was obligated to pay an amount equal to the service fee less the portion covering noncollective bargaining expenses to which she had previously objected. Based on his analysis of governing judicial decisions the arbitrator directed the Respondents to compute the amount to be deducted. Respondents provided the arbitrator and the other parties with a table showing rebate

amounts for years 1972 through 1978 which had been computed by a special committee of the international union pursuant to requirements of its own constitution. Charging Party responded with a letter objecting to the use of this calculation. The same arbitrator's award had directed Respondent to establish an escrow account for deposit of service fees paid under objection. This would permit the arbitrator to rule on the objections. Respondent never established the escrow account and no funds were ever forwarded by Charging Party. Charging Party offered to settle the entire matter by paying to a mutually agreed upon charity an amount equal to the service fee minus the Respondent's computation of the rebate. This offer was refused.

A second arbitration hearing was held by the same arbitrator on October 31. Charging Party attended that hearing but testified that it was more in a nature of a lengthy settlement conference between the two parties. Respondents presented no additional financial information as to the rebate amount beyond the table which had been forwarded to the arbitrator earlier. Evidence in support of these computations was not offered. Certain proposals were made to Charging Party by Respondent for settlement of the dues dispute but were not accepted. As a result the arbitrator issued a supplemental opinion and award. That award found that the procedure for computation of the rebate used by the Respondent was adequate and met the requirements of the governing judicial decisions. The arbitrator found that Respondent had referred the matter to a panel of reputable neutrals which procedure, the arbitrator found, met the requirements of the law. The arbitrator directed the Charging Party to begin payment of the service fee minus the rebate amount and indicated that if she refused, the Respondents could "apply to this arbitrator for further relief as the circumstances require, which relief may include termination pursuant to Article 2, Section A of the parties' contract."

Charging Party did not comply with the arbitrator's award by sending any funds to the Respondent. However, on January 7, 1980, Charging Party proposed, and shortly thereafter implemented, a plan by which she would establish an escrow account and voluntarily place the service fee funds in that account on a regular basis. Shortly thereafter, Respondents began an action in the circuit court for enforcement of the arbitration award.

Charging Party presented testimony as to the nature of the second arbitration hearing. However, in the light of finding below, on this issue, extensive discussion of that hearing is unnecessary.

Respondents called Robert Updike, an officer and staff member of Respondent who had been a participant in the events in question. He testified that since on or about November 28, 1979, neither he nor any agent of Respondents had sought or attempted to cause the City to discharge the Charging Party. On cross-examination, he stated that the purpose of the filing of the grievances was to achieve compliance by Charging Party with the agency shop provisions of the contract. He conceded that ". . . it is my belief if there were no compliance, then the net result might, in fact, in the long run, mean the termination of her employment."

Respondents also called Raymond Sisko, President of Local 2077, who also denied any attempt by Respondent, since November 28, 1979, to attempt to cause the Employer to discharge Charging Party.

Positions Of The Parties:

The Charging Party does not dispute the agency shop obligation. From its point of view, the prime issue is whether the agency shop fee demanded by Charging Party has been properly computed so as to legitimize the demand for the fee and the collary demand for discharge of the

Charging Party if the proper fee is not paid. Subsummed under this issue are a number of other issues which will be discussed below.

Respondent's defenses raise specific issues. Respondent argued that the Commission should defer to the arbitrations which have taken place in this matter. Charging Party advanced numerous reasons why deferral would not be appropriate. This issue is no longer open. See discussion, *infra.*

Respondent argues that this charge is barred by Section 16(a) of PERA because no request for termination of the employee was made within six months of the charge. Such a request is a necessary element of a charge under Section 10(3)(a)(1). Charging Party's position is that the initial demand for discharge in 1977 is a continuing one since it has never been withdrawn and since Respondent's pursuit of the arbitration procedure and filing of an enforcement proceeding in the circuit court serves to renew the demand and demonstrate its continuing viability.

The prime issue is whether Respondent has satisfied the Commission's and appeal court's conditions for enforcement of an agency shop provision in the public sector. Respondent contends that by referring the computation of the rebate amount to a panel of neutrals, albeit selected and compensated by Respondent, it has fulfilled the obligations placed upon it. Therefore, Charging Party is obligated to exhaust the union's internal procedures for appeal of these findings and only then may file an unfair labor practice charge. Charging Party denies that a union-selected panel fulfills the governing standards, and asserts, further, that it should not be bound to exhaust internal union procedure on several grounds. A detailed analysis of the specifics of this argument will be included in the discussion below.

DISCUSSION AND CONCLUSIONS OF LAW

A number of threshhold issues must be disposed of initially.

After the hearing and filing of briefs, the Michigan Supreme Court issued its decision in *Detroit Fire Fighters Association v City of Detroit,* 408 Mich 663, 293 NW 2d 278 (1980) which held that MERC may not defer unfair labor practice charges to arbitration whether on a post-award review basis under *Spielberg Mfg. Co.,* 112 NLRB 1080, 36 LRRM 1152 (1955), or on a pre-award basis under *Collyer Insulated Wire,* 192 NLRB 837, 77 LRRM 1931 (1971); *City of Detroit (Fire Department),* 1977 MERC Lab Op 267; *City of Flint,* 1970 MERC Lab Op 367. Thus, despite the thorough briefs, whether the Commission should defer to the arbitrator's awards upholding Respondents' internal procedure is no longer an issue. MERC may no longer defer an unfair labor practice charge and rely on an arbitrator's award. MERC may, conceivably, give an arbitrator's finding the evidentiary value of any outside factfinding, but that is not significant here. Therefore, this defense is not available to Respondent.

In the opinion of the undersigned, Respondent's defense based on the time bar of Section 16(a) is not well taken. Respondent's witnesses conceded, reluctantly, at the hearing that one possible result of the grievance procedure would be termination of the Charging Party's employment, should she not eventually comply with the service fee payment obligation. Respondent argues that reference in the arbitrator's award to possible "termination" of the employee is the arbitrator's choice of words, and that all that Respondent seeks is payment of the service fee. The right to ultimately demand termination of the employee would also accrue to Respondent should it succeed in its circuit court suit for enforcement of the award. Its pleading before the circuit court contains no disclaimer of the right to terminate, nor is there any indication that it seeks from the

Court anything less than full enforcement powers. Were Respondent to succeed in this suit it would have that power.

Respondent argues that sustaining the charge requires a finding that within six months prior to the charge Respondent attempted to cause Charging Party's discharge. The last overt demand for discharge occurred in 1977, long before filing of the charge. The undersigned finds this to be a strained interpretation of the realities of this situation. Despite the two year hiatus in pursuing its grievance, Respondent's actions up to and including initiation of a circuit court proceeding, shortly after filing of this charge, demonstrate the continuing nature of the demand for termination.

This fact situation appears to coincide almost completely with that presented in *Garden City School District and Garden City Ed Assoc,* 1978 MERC Lab Op 1145, in which the Commission affirmed the holding of the ALJ that pursuit of the grievance within six months prior to the charge constituted an attempt to cause discharge within the meaning of the statute. Respondent contends that although it has filed for enforcement of the arbitration award this is not proof that its purpose or object is the termination of the Charging Party's employment. However, the "object" or "purpose" of a labor organization's act may be determined by examination of the totality of its conduct. *San Francisco Culinary Workers (McDonalds of California),* 203 NLRB 719, *Local 428 Retail Clerks (Martino's Complete Home Furnishings),* 141 NLRB 503, *Local 5, Teamsters (Barber Bros.)* 171 NLRB 30, *Retail Clerks Local 899 (State Mark Inc.),* 166 NLRB 818. The undersigned finds, based on the above facts and principles of law, that within the statutory time limit, Respondent engaged in overt acts for the purpose of causing or attempting to cause the Employer to discharge the Charging Party.

The prime issue, as indicated earlier, relates to the procedures which a labor organization must follow before it can seek to enforce a service fee or agency shop obligation in a collective bargaining contract. Section 10(2) of PERA specifically permits so-called "agency shop" or "service fee" payments to be imposed on nonmembers of the exclusive bargaining agent. The legality of such contract provisions was upheld by the U.S. Supreme Court in *Abood v Detroit Board of Ed,* 431 US 209, 95 LRRM 2411. However, the Court held that service fee payers could not be compelled to support the labor organization's expenses for activities not related to collective bargaining. The Court did not discuss how parties were to determine the specific costs of these two categories of expenses although it described procedures used under certain other statutes, and made reference to the possible use of internal union remedies.

Shortly thereafter, relying on *Abood, supra,* the Michigan Court of Appeals decided *Ball v City of Detroit,* 84 Mich App 383. In that case, the Court held that the right of the nonmember not to be required to pay for union political or other nonbargaining costs requires that the union bear the burden of proof as to what portion of its expenses are properly a basis of the service fee and which are not. Once a nonmember has lodged objections to paying the full service fee, the union bears the burden of establishing the correct amount. Furthermore, this protection of the individual's constitutional rights requires that the employees not be relegated, for initial determination of the fee, to internal procedures provided by the Union, although after that initial determination, charges of noncompliance with the determination would have to be taken by the service-fee payer directly to the union's internal appeal procedures. *Ball* does not specify by whom or how the service fee amount shall be computed, but does state that the "exhaustion of remedies" doctrine does not preclude recourse to Michigan Courts in this situation.

The principals announced in *Abood* and *Ball* were further developed by the Commission in *Garden City School Dist, supra.* In that case, the labor organization sought discharge of service fee payers who refused to pay certain special assessments. The charge alleged and the Commission found, that these could not be imposed on nonmembers. In addition, although not directly in issue, the decision took up the application of *Ball,* which had just been decided. The decision found that to be enforceable the service fee would have to meet the standards of *Abood* and *Ball. Garden City* repeated the standards enunciated in *Ball* and then stated that the service fees would not be payable "until some neutral forum has adjudicated the proper amount of the agency shop fee permitted under *Abood* . . . The burden is now on the [unions] to show the proper amount of the agency shop fee to which they are entitled, *either before this Commission or a Court of general jurisdiction.*" (Emphasis added) 1978 MERC Lab Op at 1157.

This sequence of cases is relied upon by Charging Party to demonstrate that no procedure administered solely by the Union can be adequate where determining the proper service fee rebate. Since the review panel of so-called "neutrals" upon which Respondent relies consisted of persons engaged by Respondent, paid by Respondent and functioning in a nonadversary situation, however respectable their credentials otherwise, they do not constitute a neutral forum contemplated by the Commission and Court cases.

Aside from disagreeing with the analysis and emphasis within these cases made by Charging Party, Respondent's brief cites a recent Court of Appeals case. On June 3, 1980, a panel of the Court of Appeals issued a decision in *Detroit Board of Education v Parks, et al,* 98 Mich App 22. This decision involved enforcement of a service fee obligation. Among the issues presented was whether a hearing was required before discharge for nonpayment of the fee.

The Court found that a hearing was necessary on the limited issue of whether the individual employee had in fact failed or refused to make the payment. The Court then went on to observe:

> It seems that the only possible subject of dispute remaining after the required hearing might be whether or not the correct *portion* of agency shop fees has or has not been paid by a teacher who has objected to use of the fees for any but collective bargaining purposes. In that event, however, resort to the internal procedures established by the [union] for determining the amount of fees due for that purpose would be proper. (Footnotes omitted) 98 Mich App, at 43.

Respondent argues that this Court of Appeals language overrules any implication or specific finding of *Ball* or *Garden City* that an employee need not exhaust internal union remedies and appeal procedure.

Respondent relies on this statement in *Parks* despite Charging Party's argument that this observation in *Parks* is mere *dicta,* that the issue of the type of hearing on the amount of rebate was not presented to the *Parks* Court and was not even listed in the framing of issues, and was neither briefed or argued by the parties. Charging Party cites Michigan cases for the proposition that *dicta* cannot overrule prior decisions.

Charging Party also notes, that *Parks* makes no specific reference to *Ball* or *Garden City* so that these specific cases have not been overruled. The brief, argues, further, that the approach of *Parks* is erroneous as a matter of law for several reasons: (1) Charging Party is not a member of Respondent union and the exhaustion doctrine is imposed only on members because it is derived from a "contract" relationship between the member and the union. (2) A constitutional right is involved which is broader than simply the internal union relationship and obligation. (3) Requir-

ing a nonmember to participate in an internal procedure of the union would, by itself, impose upon a nonmember an aspect of membership far beyond mere paying of the service fee. At the most, the brief argues, *Abood,* refers to truly voluntary utilization of internal procedures. (4) Calculation of the rebate used by the AFSCME internal panel was not based on the standards described in *Garden City.* The AFSCME panel attempted to calculate the amount of dues used for "partisan political or ideological purposes." *Garden City* refers to *Abood* which permits a service charge for cost of "collective bargaining, contract administration and grievance adjustment." (5) Charging Party disputes the impartiality of a panel established by the Respondent and argues that there is a basic unfairness in having any decision of this import made by any person or body acting under the aegis of a party to the dispute. Charging Party sees a basic due process depreviation in such a requirement.

Charging Party raises another and broader objection to any reliance on the Respondent's internal procedures by reference to *Detroit Fire Fighters Assoc v City of Detroit, supra,* which precludes MERC from deferring to arbitration in unfair labor practice proceedings. Charging Party argues that the spirit of that case, if not the letter, should warn MERC away from relying in any fashion on private forms of adjudication, such as the internal review panel established by the Respondent in this matter. While deferral of a strictly *Spielberg/Collyer* nature is not involved, Charging Party argues that this case gives clear direction to MERC in terms of evaluating the comparable worth of a private remedy versus a remedy governed by statutory standards of procedure.

Respondent's reply to this is, in effect, that to the extent that *Garden City* and *Ball* require that the initial rebate calculation must be under judicial or Commission supervision, this departs from *Abood* which favors the establish-

ment of voluntary, internal procedures and is in keeping with the general approach in labor relations requiring the exhaustion of available private remedies before resort to outside agencies. Respondent argues that, in any event, the *Parks* case resolves the issues and is controlling.

The parties, particularly Charging Party, have been diligent in bringing to the attention of the ALJ subsequent related decisions. In *Central Michigan University Faculty Assoc v Stengren,* No. 76-006456-CZ (July 7, 1980), an Isabella County Circuit Court supported Charging Party on the issues herein. In *Greenfield School Committee v Greenfield Education Assoc.* No. 14646 (July 31, 1980), a Massachusetts court upheld Charging Party's position. Charging Party also cites *Bagnell v Airline Pilots Assoc,* —— F2d ——, 104 LRRM 2769 (1980), which relates to the exhaustion of internal union remedies. Respondent disputes the applicability of *Bagnell* and argues that the other cited cases support Charging Party's position, but Respondents argue that MERC should not create another forum for this type of adjudication.

Some initial discussion is warranted of the large amount of material contained in the earlier briefs. Both sides discoursed at length on the propriety of drawing inferences from refusal of courts to grant rehearings, reconsider decisions on motion or grant interim remedies. The briefs compared the composition of sequential appeal court panels. The briefs described with considerable fanfare related cases pending in Michigan Courts and speculated on the motives behind the failure of the other side to reveal some of these developments. None of this is more than the "extended discussion of irrelevant matters" which one of the briefs disavowed before launching its own extended counter-analysis. However, the briefs were equally generous in dealing with the issues.

The briefs and arguments of the parties reveal that they are arguing simultaneously on two levels—one which might

be called "mechanical jurisprudence" and the other that of policy. Whether the language of the Court of Appeals in *Parks, supra,* is "mere" *dicta,* and the precise interrelationship of *Ball, Garden City* and various Court of Appeals cases partake of the "mechanical jurisprudence" approach. Whether a nonmember should be subject to a union's internal procedures is a question of law and policy.

Despite the many cases cited, the ALJ is bound by decision of the Commission and the Commission is bound by the appellate courts.

The Commission in *Garden City* expressed the view that it was bound by *Ball. Garden City* dealt with the propriety of the collection by the unions of a particular assessment from nonmembers. Since nonmembers were involved the Commission considered the applicability of *Ball* to *Abood.* The Commission made the following findings:

> In ordering appropriate remedies in this case, we must take note of the Michigan Court of Appeals' recent interpretation of *Abood* in *Ball v City of* Detroit, No. 22586 (Slip Op. July 5, 1978). In implementing *Abood,* the Ball court held that (1) the initial determination of appropriate agency shop fees must be "adjudicated on a case-by-case basis," Slip Op. P. 8, (2) that pending such litigation, the proper way to protect objecting nonmembers is to place their service fees in escrow, (3) that annually the union shall adjust its service fee "according to fluctuations in permissible expenditures," Slip Op P. 9, but that (4) after the initial neutral determination of the proper amount of the service fee objecting agency payers must exhaust internal union procedures before challenging the service fee in court.
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> To the extent that *Ball* addresses an issue in controversy here, we must order a remedy which is consistent with that opinion. It would seem that *Ball* mandates

> further litigation in this case, at the opinion (sic) [option] of the Associations, to establish the proper amount of the agency-shop fee to which they are entitled.[1] . . .
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> [1] It is possible, of course, that the Associations may choose not to litigate the proper amount of their agency-shop fees in this case. The Association may elect to waive the claims to past-owed agency-shop fees from the Chamberlains by written notification to that effect. However, current owing fees and amounts payable in the future may not be collected from these Charging Parties until some neutral forum has adjudicated the proper amount of the agency-shop fee permitted under *Abood*. These Charging Parties have adequately stated their objection to the agency-shop fee and will not be required to renew their objections continuingly. The burden is now on the Associations to show the proper amount of the agency-shop fee to which they are entitled, either before the Commission or in a Court of general jurisdiction. 1978 MERC Lab Op, at 1156-1157.

There has been no appeal or further judicial review of either *Ball* or *Garden City*. Therefore neither of these cases has been either specifically affirmed or reversed. There have, however, been court decisions on various levels and in different jurisdictions, which have directly or indirectly dealt with the issue herein. Responding to these cases may prompt both "mechanical jurisprudence" analysis and substantive discussion.

A conflict which may be subject to the "mechanical jurisprudence" type of analysis is that raised by the *Parks* decision. Conflicts between panels of the Michigan Court of Appeals may occur since decisions of one panel are not binding on another panel. *State of Mich v Chippewa Landing*, 82 Mich App 37, 43 (1978), *Monfills v City of Sterling Hgts*, 84 Mich App 330, 332 (1978). A ruling of the Court of Appeals is binding on lower courts, and presumeably administrative agencies, until another panel of the court disagrees or until the Supreme Court declares

otherwise. *People v McDaniels,* 70 Mich App 469 (1976), *Hackett v Ferndale City Clerk,* 1 Mich App 6 (1965). *Parks* was not a review of any part of *Ball* or *Garden City,* and the holdings in each of the latter remain the law of those specific cases. However, for other cases the question is whether we are faced with conflicting Court of Appeals decisions.

Charging Party contends in its brief that *Parks,* on this point, is entirely *dicta* and may not be taken to have overruled *Ball,* citing *Sweeney v Sweeney,* 71 Mich App 428, in which the Court of Appeals observed that it would not rely on dictum in one supreme court decision to overrule a specific holding in an earlier supreme court decision.

In what I have called, reluctantly, the "mechanical" analysis of this case, this becomes a crucial point. In the opinion of the undersigned *Sweeney* must be distinguished. In *Sweeney* there was a binding opinion of the supreme court which could have been overturned only by the supreme court. (Even members of the supreme court are duty bound to adhere to decisions of that court until overruled. *Valentini v City of Adrian,* 347 Mich 530.) In *Sweeney* the question was whether a binding decision of the supreme court had been reversed by an equally binding decision of the same court. *Parks* raises the question, not whether *dicta overrules* a prior case but whether *dicta* of one appellate panel has sufficient standing to constitute a conflict between panels under the rule in *Hackett v Ferndale City Clerk, supra. Parks* represents that court's definition of the totality of procedures attendant upon the matter before us, i.e., enforcement of an agency shop. In the opinion of the undersigned, although no *dicta* (nor the main holding) in *Parks* can or does overrule *Ball,* it does raise a conflict with another panel of the Court of Appeals. It is a clear expression of that Court's view, and lower courts must accord, at least, sufficient respect to that holding to require a finding that the question is the subject of a conflict of Court of Appeals' panels.

After the parties had, apparently, exhausted themselves in the filing of briefs and reply briefs, the Michigan Education Association and the Michigan Educational Support Personnel Association moved for leave to file, and filed, an *amicus curiae* brief. This brief consisted primarily of further detailed analysis of *Parks,* as well as descriptions of cases pending in various courts in the state which, the brief contended, might prove determinative. Attached to the brief, but not discussed, was the text of a Michigan Court of Appeals decision in *White Cloud Education Association v White Cloud Board of Education and William Jibson,* —— Mich App ——, No. 45898 and 46178 (November 4, 1980) which had issued after counsel completed his brief. In response to this filing Charging Party requested and was granted permission to file a reply.

In *White Cloud* the defendant, a teacher, refused to become a member of the plaintiff labor organization or pay an agency shop fee. The union asked the employer school board to hold a tenure hearing to discharge the employee and brought suit when the employer refused to honor this request. The primary issue before the court was whether the tenure act precluded discharge. The Court of Appeals affirmed the lower court grant of summary judgment to the plaintiff, holding that the tenure act does not govern and that the employee's admitted refusal to pay the agency shop fee obviated the need for further hearing on the fact of payment. The employee, in addition, argued that under *Abood v Detroit of Education, supra,* he was entitled to place the disputed fee in escrow pending a determination of the amount applicable to collective bargaining and contract administration. The Court of Appeals upheld the circuit court refusal to follow this procedure. The circuit court had directed the employee to pay the entire fee to the union, after which, upon request of the employee, the Court would determine the appropriate amount due to the union. The employee continued to refuse

to follow this procedure and would agree only to creation of an escrow account.

The court in *White Cloud* recognized that this contention falls directly under the *Ball v City of Detroit* decision. Quoting *Ball* on the escrow requirement, the *White Cloud* court says:

> Our ruling in *Ball* clearly accords paramount status to the employee's First Amendment rights vis-a-vis the union's right to that portion of the fee which will be used for collective bargaining, contract administration and grievance adjustment. While we continue to adhere to that principle, we now believe that the employee's First Amendment rights can be adequately safeguarded if the disputed fee is paid to the union and the employee files suit for declaratory judgment under GCR 1963, 521. P.6 of Slip opinion.

Charging Party's reply brief responded in detail to the *amici* analysis of *Park* and other cases. In regard to *White Cloud,* Charging Party agreed that it does conflict with *Ball,* and that the lower courts may follow either case. The brief argued, however, that *White Cloud* basically, agreed with *Ball* that an outside forum was required to decide the appropriate fee rather than relying on the union's procedures.

This decision in *White Cloud* requires close analysis. It holds that the employee must pay the entire fee to the union and then may begin an action to determine the precise portion of the fee dedicated to nonbargaining uses. The case holds explicitly that the employee may be discharged for failure to pay the fee prior to this determination and that the employee may not insist on paying into an escrow account. This holding does not expressly pass on the "exhaustion issue". It does hold that the union may enforce the agency shop obligation without any pre-

liminaries. This conflicts with the requirement in *Ball* and *Garden City* that the union initiate litigation to determine the amount of the fee.

What does this mean for the issues presented herein? If under *White Cloud,* a union may demand full payment of the fee during litigation, it would seem to follow *a fortiori* that it may insist on payment of a lesser amount although that lesser amount has been determined by its own internal procedure. It appears to the undersigned that the employee can challenge that internal procedure either while participating in it, following its appeal steps and raising any issues, or by challenging the entire procedure in another forum, attacking its validity in whole or in part.

In the instant case, Respondent presented the arbitrator with the figures which, under the internal procedure, had been found to be a reasonable evaluation of its collective bargaining costs. It would appear that the arbitrator may accept this figure, although determined by the union's internal board, since, under *White Cloud* he would have been obligated to find a demand for the full amount enforceable.

The ALJ and MERC must now reconcile the cases and create a rational procedure which will protect the rights of all the parties and harmonize the decisions as much as possible. Charging Party argues in its brief that the time has come for MERC to "put some teeth" in *Garden City.* In the opinion of the undersigned, with the issuance of *White Cloud* and, to a lesser degree, *Parks,* the teeth have been effectively pulled from both *Garden City* and *Ball.* Charging Party complains correctly, that the procedures called for in *Garden City* have been generally ignored; no labor organizations have initiated proceedings before MERC to determine the correctness of their agency shop fees. This is not surprising, since *Garden City* provided no method. The procedure suggested in *Garden City* flowed in a direction contrary to the statutory pattern under which MERC

ordinarily functions.[2] Although making no reference to MERC, the procedure prescribed in *White Cloud* is consistent with the adversary structure of MERC hearings. An element in any attempt to harmonize the various cases should be that proceedings are initiated by an injured party. It is the employee who is being asked to pay an improper fee, and whose employment is threatened and it is the union allegedly acting in violation of the law.

Thus, an employee threatened with discharge or who is simply required to pay an illegal fee, *AAUP v Morgan*, 100 Mich App 219 (1980), could raise all relevant issues.

White Cloud, furthermore, in relation to *Ball*, sees itself as more than just an inconsistent decision. *White Cloud* purports to interpret and apply *Ball*. In discussing the *Ball* holding the court says specifically ". . . we *now* believe . . . ." *White Cloud* tells us what *Ball* means. Therefore, while it does not have the power to reverse *Ball*, this panel of the Court of Appeals has gone as far as it can to instruct the lower courts as to the meaning of *Ball*.

The remaining issue is whether, before filing a charge with MERC, the employee must exhaust the internal procedures of the union. *White Cloud* is silent on this issue since it contemplates the employee paying the full fee while the proceeding is pending. This avoids the question of the correctness of the union's determination. The court, simply, is not concerned with the union's determination and internal procedures and it is willing to cause the employee to temporarily support the union's non-bargaining costs.

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[2] MERC has never used rule-making procedures, and has declined to issue declaratory judgments. *Madison Heights*, 1979 MERC Lab Op 638; *Alpena Public Schools*, 1972 MERC Lab Op 113.

In the opinion of the undersigned, there is no need to ignore the direction in the prior decisions that an objecting employee should not be forced to pay nonbargaining costs. Therefore, another necessary element in the procedure must be to reduce the fee as early in the process as possible. While the escrow approach denies the union even the funds it is entitled to, *White Cloud* goes to the other extreme and gives the union use of the funds it will have to return. A finding under these conflicting cases can and should grant a relief under *Abood*. This can be done by requiring the labor organization to compute the refundable amount and collect only the difference.

Another consideration in designing a procedure is the question of relitigation of the same fees by different employees. The procedure which the Commission adopts should avoid this. In the instant case, the by-laws and constitution of the Respondent call for the International Union and its subordinate bodies to annually compute the rebate. Any objecting employee must timely file his or her objections each year to receive the rebate. The employee, if dissatisfied with the computation, may appeal it to Respondent's "judicial panel" consisting of members and officers of the organization and, from there, if the employee or nonmember wishes, to the neutral review panel. Respondents herein provided the arbitrator with the initial computation of the International Union. Charging Party refused to accept those figures but also refused to appeal through the union's procedure. The record does not indicate whether these computations had been brought before the review board by any other employee although the arbitrator's supplemental award appeard to rest, in part, on a finding that a distinguished panel of neutrals had approved the figure. It is unreasonable to require an employee who files a charge with the Commission to exhaust the union's internal remedies if other employees have litigated the same fees before the review board. In effect, this recognizes that there is a quasi "class-action" quality to this

type of proceeding. Nevertheless, if the Commission is going to pass upon the reasonableness of the procedure, some employee must have used that procedure. The Commission could pass on such elements as the promptness of the implementation and administration of the procedure. *Cf, United University Professions Inc. and Morris E. Eason,* N.Y. Public Employment Relations Board, Case No. U-2951 (Aug. 24, 1979). *See Government Employment Relations Report,* No. 837 (Nov. 19, 1929) p15. Accordingly, on a charge against a union on a specific fee, the Charging Party must show that he or some other employee had carried the matter as far as it could be carried within the union structure. Thus, if the issues are properly raised in a charge, the Commission could pass on the fee as well as on the adequacy of the procedure used by the labor organization to determine and review the fee.

Taking all of these findings together, the procedure which would incorporate elements of the various decisions and, in the opinion of the undersigned, effectuate the policies of the Act would be the following: An objecting employee must pay the reduced service fee to the union while litigating his objections. *Cf, White Cloud.* If the labor organization has no procedure for computing the proper fee, the employee need not pay any amount and may immediately file an unfair labor practice charge with the Commission.[3] Even if no request is made, any attempt by a union to collect an improper fee is a separate unfair labor practice and would permit a charge. *Cf, AAUP v Morgan, supra.*[4]

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[3] If the employee prefers to file for declaratory judgment in a circuit court, he would have to pay the entire fee if the lower court follows *White Cloud.*

[4] While a facially invalid agency shop clause would permit filing of a charge without an attempt to enforce it, this contract remains facially valid since it is only after an objection that *Abood* becomes applicable.

In such an action the burden of proof would be upon the labor organization as stated in *White Cloud* and *Ball.* If the labor organization provides an internal appeal procedure for reviewing the computation, the employee must exhaust those procedures before filing any charge with MERC or show that the internal appeal procedure had been exhausted by other persons and the fee approved. Furthermore, the internal review procedure must be one which does not impose onerous conditions or unreasonable costs, such as travel to distant points or legal expenses. It must be one which an employee can pursue if he wishes without legal counsel.

The question may be asked, whether the Commission should deviate from *Garden City.* In this regard it is important to note the genesis of the *Garden City* holding on this point. Charging Party vigorously argues that we must disregard the *dicta* in *Parks* because it dealt with an issue neither presented to the court, briefed or argued. Similarly, in *Garden City,* an examination of the decision and of the record, briefs and exceptions, shows that this entire issue was never litigated or briefed. Rather, the Commission in framing a remedy, took note of *Ball,* "to the extent that *Ball* addresses an issue in controversy" in the case. In the opinion of the undersigned, the *White Cloud* decision as well as the discussion, above, regarding *Parks* and *Ball* warrants reexamination of *Garden City* in regard to the procedure for initial computation and review of the service fee rebate.

The cases, including those relied on by Respondent, contemplate judicial or administrative agency surveillance and review of the computation. The only question is when judicial or administrative agency involvement shall be invoked and the recommendation, herein, speaks to that issue.[5]

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[5] An adversary procedure is suggested by the Commission observation in *Garden City,* at page 1156, that "nowhere in the

Further light on *Garden City* is cast by a law review article entitled "The agency shop after *Abood;* no free ride, but what's the fare?" by Charles M. Rehmus and Benjamin A. Kerner, 34 *Industrial and Labor Relations Review* 90 (October, 1980).[6] The writers in discussing *Garden City* among other related cases state, that "MERC ennunciated a new unfair labor practice, namely, the collection of a service fee equal to dues when some of that amount evidently is being used for political purposes." Id. at 98. This statement puts *Garden City* in a conventional unfair labor practice framework. Discussing the Michigan litigation the writers observe ". . . it is not at all clear whether any of the *Ball* court's controversial rulings on remedies will ultimately survive as the law of the State of Michigan. Even more important, it seems questionable, if *Abood* or a similar case again comes before the Supreme Court, any of the formalistic remedies of the type found necessary in *Ball* will survive as a requirement of federal constitutional law." *Id.* at 98-99. After reviewing cases, statutes and procedures of other states facing the same issues, the writers conclude: "Internal rebate plans or advance dues reduction plans if fairly administered can, as the Supreme Court recognized in *Abood,* delineate the use of union money for partisan purposes (to which some may object) from the use of money for more general as

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record does it appear that the Respondent Associations have attempted to justify their expenditures in response to the [employees'] objections". This implies that such evidence would have been appropriate. However, this conflicts somewhat with the final holding that MERC or court determination of the rebate amount must occur before a demand for discharge. In *Garden City,* proofs offered at the hearing would have been too late under this doctrine.

[6] While individual expressions by the judge who writes an opinion are unauthoritative, *Lakeshore and MSR Co. v Perkins,* 25 Mich 329, later opinion of one signator of the decision and a staff member, involved in its writing, is of some interest.

well as collective bargaining objectives (from which all will benefit). The courts can surveil the occasional lapses that may occur in the administration of the rebate plans. Beyond this, neither administrative agencies nor courts should be constitutionally or reasonably required to go." *Id* at 100. Subsequent Michigan cases indicate a degree of presence in these reflections and warrant Commission review and revision of *Garden City.*

A final question is whether this recommendation overlooks the constitutional issue. *Ball* stressed that grave constitutional issues preclude reliance on anything but a prior court hearing for protection of the individual nonmember's rights. *White Cloud* found that review after full payment was protection enough. Charging Party protests imposition of the exhaustion requirement on a nonmember. Is another view possible? It seems to the undersigned, that when these issues are presented as broad constitutional abstractions they, indeed, take on major portions. However, when placed in the context of a realistic labor relations scene, the dimensions of the issue, if not its significance, is more clearly presented. This is expressed in Justice Frankfurter's dissenting opinion in one of *Abood's* progenitors, *Machinists Association v Street,* 367 US 704, 48 LRRM 2345 (1961):

> "[C]ountless claims of right can be discovered to have the source of their operative limits in the provisions of a federal statute or in the constitution itself, with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by."

This observation provides a context in which conflicting cases and the exhaustion of remedies requirement can be viewed. If the Commission follows the recommendation

herein, no nonmember would be left without recourse to a neutral agency. The question is whether the initial determination of the nonmember's obligation may not be entrusted to a voluntary internal procedure established by the labor organization in light of the minimal size of any possible error and the minimal risk of infringement on the constitutional rights of the nonmember.

The basic question of the employee's right of association have been answered by *Abood*. The power of MERC, in an unfair labor practice case, or of a court, to review the fee is undisturbed. If due process is not followed in the union's internal procedure, it would fail the test on review. This approach does not say that the arguments against exhaustion are necessarily wrong. It is to say that they are misplaced. If the internal remedy were final and binding, or if the dispute involved an immediate and major risk to the nonmember, these arguments would have more force. In the opinion of the undersigned, this recommendation is not insensitive to the constitutional rights described in *Abood, Ball* and related cases. Indeed, *White Cloud* would put the nonmember's entire fee in the hands of the union, at least, temporarily. Rather, this approach attempts to look at all the cases in the area and to frame a procedure that permits the administration of PERA in the framework of the governing case law.

Applying these rulings to the instant case, Charging Party has not paid any amount to the Respondents. Respondents have computed the reduced fee, applying to the local organization an average of the figures found by the International. If Charging Party objects to this figure she must appeal it to the Respondent's judicial panel and review board, unless these bodies have already passed upon the fee computation for the International and the local bodies involved. If Charging Party is not prepared to follow these steps, the charge could be dismissed. If Charging Party can show that these conditions have been met then,

in the opinion of the undersigned, a charge may be filed with this Commission attacking the computation or the method of arriving at it. However, the undersigned does not believe that that proceeding should be part of this charge. Because this procedure is novel, it would appear that the Commission should have an opportunity to rule on it first. Should the Commission adopt this recommendation, this charge must be dismissed, since Charging Party has refused to pay any fee. However, she would be protected from either discharge or collection of an excess fee until Respondents take some overt action and she decides whether to comply with the conditions herein if a further charge should be required.

Based upon the above findings of fact and conclusions of law, the undersigned, therefore, recommends that the Commission issue an order dismissing the charges and complaint.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Shlomo Sperka, Administrative Law Judge

DATED: February 24, 1981

APPENDIX C

Order of the Michigan Court of Appeals Denying Plaintiff-Appellant's Application for Rehearing

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the fifteenth day of July in the year of our Lord one thousand nine hundred and eighty-three

[Order entered July 20, 1983]

DAVID E. KEMPNER,
Plaintiff-Appellant,

-v-

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY, TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO AND METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,
Defendants-Appellees.

Docket No. 63491

MERC # CU 79 L-60

Present the Honorable Thomas M. Burns, Presiding Judge
Richard M. Maher, Harold Hood, Judges

In this cause an application for rehearing, a motion for immediate consideration and a motion for leave to file a supplemental authority have been filed by the plaintiff-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for immediate consideration shall be and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the motion for leave to file a supplemental authority shall be and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the application for rehearing shall be and the same is hereby DENIED for lack of merit in the grounds presented.

[clerk's certificate omitted]

APPENDIX D

Order of the Michigan Supreme Court Denying Application for Leave to Appeal

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 8th day of June in the year of our Lord one thousand nine hundred and eighty four.

DAVID E. KEMPNER,
Plaintiff-Appellant,

-v-

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY, TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO AND METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,
Defendants-Appellees.

72287 & (52)
SC: 72287
COA: 63491
(126 MA 452)
LC: MERC

Present the Honorable G. Mennen Williams, Chief Justice; Thomas Giles Kavanagh, Charles L. Levin, James L. Ryan, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Associate Justices.

On order of the Court, the motion for peremptory reversal is denied.

The application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

[clerk's certificate omitted]

APPENDIX E

Notice of Appeal

STATE OF MICHIGAN
COURT OF APPEALS

DAVID E. KEMPNER,
Plaintiff-Appellant,
vs.

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY, TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME and METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,
Defendants-Appellees.

Michigan Supreme Court No: 72287

Michigan Court of Appeals Docket No: 63491

Michigan Employment Relations Commission Case No: CU 79 L-60

[identification of attorneys omitted]

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

DAVID E. KEMPNER, Plaintiff-Apellant in the above-referenced matter, by and through his attorneys, KELLER, THOMA, SCHWARZE, SCHWARZE, DUBAY & KATZ, P.C., hereby gives notice to the Michigan Court of Appeals and the Michigan Employment Relations Commission—the court and administrative agency having possession of the record herein—of an appeal to the United States Supreme Court. The appeal is taken from the *Per Curiam* Opinion of the Michigan Court of Appeals dated June 8, 1983 which upheld the validity and constitutionality, as applied, of that portion of the 1973 P.A. 25 providing for compulsory agency

shop agreements in Michigan public employment, Public Employment Relations Act, § 10 (1)(c). The Michigan Court of Appeals entered said Opinion when it reviewed the Decision and Order of the Michigan Employment Relations Commission (dated March 11, 1982), adopting the Recommended Order of the Administrative Law Judge (dated February 24, 1981) in this matter. The Michigan Court of Appeals denied rehearing by Order dated July 20, 1983, and the Michigan Supreme Court denied Plaintiff-Appellant's Application for Leave to Appeal by Order dated June 8, 1984.

The instant appeal to the United States Supreme Court is taken under 28 U.S.C. § 1257(2) since (a) the above-referenced matter draws into question the validity under the United States Constitution of a portion of a Michigan statute (1973 P.A. 25), and (b) the above-referenced Opinion of the Michigan Court of Appeals constitutes a final decree in favor of the validity of the portion of said statute being challenged by the highest court of the State of Michigan in which a decision could be had.

Respectfully Submitted,

KELLER, THOMA, SCHWARZE,
SCHWARZE, DUBAY & KATZ, P.C.

BY /s/ David E. Kempner (P-23329)

Milton L. Chappell
NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION, INC.

ATTORNEYS FOR PLAINTIFF-APPELLANT

[Addresses and phone numbers of attorneys omitted]

Dated: June 26, 1984

[A copy of the Notice of Appeal also was filed with the Michigan Employment Relations Commission, the administrative agency possessed of the record.]

APPENDIX F

Joint Exhibit #4

MICHIGAN EMPLOYMENT RELATIONS COMMISSION HEARING

AFSCME International Constitution
Art IX, § 10, Art XII
(Internal Union Rebate Appeals Procedure)

ARTICLE IX

Rebates

Section 10. Any member, or any other person making service or similar payments to a local union in lieu of dues under agency shop or similar provisions, who objects to the expenditure of any portion of such payments for partisan political or ideological purposes shall have the right to dissent from such expenditures. The amount of the union's expenditures for such purposes shall be determined annually in the following manner. For the International Union, the International Secretary-Treasurer shall by April 1 each year ascertain the total expenditures of the described kind during the preceding fiscal year, and shall determine therefrom mathematically the portion of per capita payment or its equivalent which is subject to rebate. For each council and local union which has made expenditures of the described kind, its chief fiscal officer shall make like calculations by April 1 or, if some other date is more appropriate to the council or local fiscal year, then by such other date. An objector shall file written notice of an objection by registered or certified mail with the International Secretary-Treasurer between April 1 and April 16 of each year, stating those subordinate bodies to which dues or service fee payments have been made. An objection may be renewed from year to year by written notification to the International Secretary-Treasurer dur-

ing the stated period each year. Each year, during February, the International Union shall set forth in its regular publication a description of this system including the dates within which notice of objection must be filed.

If a law authorizing an agency shop or similar service fee requires a rebate based on criteria other than those set forth above and if the required criteria would result in the rebate of a larger portion of the fee paid, this Section shall be applied so as to insure that the larger amount is rebated to any objector paying an agency shop or similar service fee under such law.

The International Secretary-Treasurer shall transmit each objection received to the chief fiscal officer of each involved subordinate body. Rebates shall be provided by registered or certified mail, or otherwise receipted delivery, by the International Union and each involved subordinate body to each individual who has timely filed a notice of objection, as provided herein.

If an objector is dissatisfied with the proportional allocation that has been established on the ground that assertedly it does not accurately reflect the expenditures of the International Union or subordinate body in the defined areas, an appeal may be taken to the Judicial Panel. Any such appeal must be filed in writing within fifteen days of receipt of the rebate check from which appeal is made. If an appeal has been timely filed, the Judicial Panel shall schedule a hearing under the rules of procedure of the Judicial Panel. The decision of the Judicial Panel on such appeal shall be issued within a reasonable time. If an objector is dissatisfied with the decision of the Judicial Panel, a further and final appeal may be taken as follows: An AFSCME member who has proceeded through the preceding steps and who wishes to do so may appeal the decision of the Judicial Panel to the next International Convention. A non-member who has paid a service or similar fee and has proceeded through the preceding steps

and who wishes to do so may appeal the decision of the Judicial Panel to the Review Panel established in Article XII. Any appeal to the Review Panel must be filed in writing within fifteen days of receipt by the non-member of the decision of the Judicial Panel. The Review Panel shall decide such appeals as expeditiously as possible consistent with the right of an appellant to a full and fair proceeding.

ARTICLE XII

The Review Panel

Section 1. In order to ensure objective disposition of complaints by non-members about rebates of sums paid to the union under agency shop or similar provisions, there shall be established a Review Panel composed of prominent citizens who are not otherwise a part of or employed by AFSCME.

Composition

Section 2. The Review Panel shall consist of not more than five members, including the Chairperson. The International President shall, with the approval of the International Executive Board, designate the members, including the Chairperson of the initial Review Panel. Thereafter, whenever a vacancy shall occur on the Review Panel, said vacancy shall be filled by the International President, with the approval of the International Executive Board, from a list of names submitted by the remaining members of the Review Panel.

Authority

Section 3. The Review Panel shall have the authority and power to make final and binding decisions in non-member rebate cases appealed to it from the Judicial Panel, as provided in Article IX, Section 10.

Rules of Procedure

Section 4. The Review Panel shall formulate such rules of procedure and establish such practices as it finds necessary to its proper functioning.

Report

Section 5. The Review Panel shall submit to the International Executive Board an annual report of its activities, which report shall contain a summary of all cases brought before the Panel during that year. Copies of this annual report shall be available on request to all members and nonmembers subject to an agency shop or similar provision.

Expenses

Section 6. The expenses of the Review Panel shall be provided for by the International Secretary-Treasurer, who shall establish the necessary bank account(s), and shall deposit therein such sums as are designated by the International Executive Board semi-annually. The International Executive Board shall designate the necessary sums on the basis of a budget submitted to it by the Review Panel. The Chairperson of the Review Panel shall have its books and financial records audited annually, and such audits shall be submitted to the International Secretary-Treasurer and through the Secretary-Treasurer, to the International Executive Board. For the purpose of ensuring the impartiality and independence of the Review Panel, the budget shall be approved unless grossly excessive.

APPENDIX G

Decision & Order of the Michigan Employment Relations Commission and Decision on Petition for Rehearing and Clarification

In the Matter of:
GARDEN CITY SCHOOL DISTRICT,
Respondent-Employer,
-and- Case Nos. C76 J-344
GARDEN CITY EDUCATION ASSOC., and CU76 J-45
MICHIGAN EDUCATION ASSOC. CU76 J-46
Respondent-Association,
-and-
PAUL E. CHAMBERLAIN and
LORE M. CHAMBERLAIN, Individuals,
Charging Parties.

[identification of attorneys omitted]

[as officially reported in 1978 MERC Lab. Op. 1145]

DECISION AND ORDER

On May 24, 1978, Administrative Law Judge Joseph B. Bixler, issued his Decision and Recommended Order in these consolidated cases finding that Respondent Garden City Education Association (GCEA) had violated Section 10(3)(a) and (b) of the Public Employment Relations Act (PERA), 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCLA 423.210; MSA 17.455(10), by demanding the discharge of the Individual Charging Parties because they failed to pay monies other than a service fee equivalent to the amount of dues required of members of

GCEA (hereafter the Association). The Administrative Law Judge also found that Respondent Garden City School District and Respondent GCEA had violated Section 10(1)(c) of the Act by entering into and enforcing a facially invalid contract requiring such payments.

The Decision and Recommended Order was issued and served upon the parties in accordance with Section 16 of PERA. The two Charging Parties through their common attorney and the three Respondent-Associations through their common attorney have filed various exceptions. Respondent Garden City School District did not file exceptions.

On our review of the voluminous record in this case, we feel the Administrative Law Judge has made a fair and concise statement of the facts and we hereby adopt them as our own. However, we find that the record also warrants additional findings of fact, which are necessary to our disposition of this case. We find that the Teachers Assistance Program (TAP) was conceived and initiated by Respondent MEA obstensibly to aid all teachers in the event of a work stoppage, but that in fact it was administered in Garden City so as to aid only Association members in the event of a work stoppage. In a letter GCEA President Ann Riley wrote to the Chamberlains (Ch. Pty. Ex. 32) the Association indicated that cash grants from the Teachers Assistance Program "were publicized to all members in good standing." Respondent's brief on exception confirms this administration by stating, "as indicated by former GCEA President Ann Riley's letter (Ch. Pty. Ex. 32) to Charging Parties, these funds had been available to all *members* who had the need and who timely applied." (Emphasis added). We find that in Garden City the TAP was administered so as to benefit Association members only.

We further find that one of the primary participants in this case, Mr. Maurice Hart, was a paid employee of

Michigan Education Association. On cross-examination, Mr. Hart testified as follows:

> Q Mr. Hart where are you employed?
> A In Detroit.
>
> Q Who is your employer?
> A The Michigan Education Association, Garden City Education Association, MEA.
>
> Q How long have they been your employer?
> A Seven years.
>
> Q During that seven years, did you hold the current position you hold now? The same position?
> A Yes.
>
> Q (By Administrative Law Judge Bixler) What is the position?
> A Executive Director.

Other parts of the testimony variously characterize Mr. Hart's position with MEA as service agent for three local associations or as regional UniServ Director. In any event, it is clear that Mr. Hart's salary was paid by MEA and that his duties involved servicing three local affiliates, one of which was Garden City Education Association. In this role, Mr. Hart also held the title of Executive Director of the Garden City Education Association. We think the evidence establishes the fact that Mr. Hart was the MEA representative in Garden City, no matter what title he may have used.

The above-stated facts we find to be established in addition to those found by the Administrative Law Judge and set forth in his opinion.

We agree with the Administrative Law Judge's ruling that this case was not appropriate for deferral to arbitration. Although certain issues in the case require interpretation of contractual language, these issues are inextricably interwoven with questions of statutory interpretation.

Issues of this kind are to be resolved on first impression by this Commission *City of Detroit, Fire Department,* 1977 MERC Lab Op 267.

As to the timeliness of these charges in light of the six months' statute of limitations in Section 16(a) of PERA, we are convinced that the Administrative Law Judge made correct determinations. As noted in his opinion, the charges relating to the facial validity of the union security clause must be considered separately from the charges relating to enforcement of that clause by attempting to discharge noncomplying employees. The former, if proven, would constitute a continuing violation of PERA and are actionable as long as the contract is enforced. *Schorr Stern Food Corp.,* 227 NLRB 245; 94 LRRM 1331 (1977). The latter charges are actionable under Section 10(3)(b) of PERA if the demand for discharge fell within the six-month period preceding filing of charges. Filing occurred on October 25, 1976, and the Union's formal demand for discharge occurred on April 28, 1976. Thus, the six-month period is met as to those items reference in the Association's demand for discharge.

The Association's demand for discharge took the form of demand for arbitration for "failure to pay dues and assessments for the 1975-76 school year." We find that the "dues and assessments" not itemized in the demand for arbitration are adequately specified by the surrounding correspondence and grievance forms to include the following from each Charging Party:

$119.50 - MEA Dues
$ 25.00 - NEA Dues
$ 25.00 - GCEA Dues
$ 10.00 Teachers Assistance Program
$ 75.00 - Crestwood Assessment

Two additional payments were originally required of the Chamberlains—fees to support the political action com-

mittees of both MEA and NEA. However, we find that these two fees were not included in the arbitration demand. An earlier document in the grievance process, signed by Association President Robert Draheim acknowledges that "Mr. and Mrs. Chamberlain, as agency payers, are also relieved of the responsibility for paying $1.00 to the National Education Association Public Affairs Council (NEA-PAC) and $5.50 to the Michigan Education Association Public Affairs Council (MEA-PAC)." (Ch. Pty. Ex. 28, p. 3). Furthermore, in a post-arbitration demand letter from the Association's attorney to the Chamberlains, the Charging Parties were advised that as a result of separate proceedings with the Federal Election Commission, the Association's demand for MEA-PAC and NEA-PAC monies was being dropped altogether. By looking to the behavior of the parties prior to the six-month limitations period and after the filing of charges, we can properly resolve the meaning of ambiguous conduct within the limitations period. *Anchor Rome Mills,* 228 F2d 775; 37 LRRM 2367 (5th Cir. 1956); *Colorado Pipe Lines,* 189 NLRB No. 86; 76 LRRM 1673 (1971). Because we have found that MEA-PAC and NEA-PAC were not part of the arbitration demand, we find no further reason to consider their legality in this case.

As to the merits of the substantive claims raised in this litigation, in preliminary summary, we hold that (1) the union security clause in the parties' contract is illegal on its face for requiring of nonassociation members the payment of special assessments in addition to regular dues, as a condition of continued employment, (2) the manner in which agency-shop payments, as opposed to Association dues, are collected by GCEA is not illegal, (3) a local affiliated Association, such as GCEA, may collect dues or agency-shop payments for its parent organizations when membership in the parent organization is required to maintain membership in the local affiliate, (4) agency-shop payments owed to any labor organization representing public employees are subject to the "political expenditure" limi-

tation formulated in *Abood v Detroit Board of Education,* 431 US 209 (1977), (5) none of the three Association Respondents in this case has met the burden of showing that the payments demanded of the Chamberlains in lieu of membership dues conform to *Abood* standards, and (6) by executing and enforcing a contract which illegally required the payment of assessments, Respondents Garden City School Board and GCEA violated Section 10(1)(c) of PERA. Finally, GCEA and MEA are liable for causing or attempting to cause the discharge of a public employee in violation of Section 10(1)(c) of the Act. We have considered the Charging Parties' exceptions relating to the liability of NEA and have concluded that the facts of this case do not warrant fixing liability there. Each of these holdings will be considered in detail below.

The parties' contract has a union security provision which is set forth in total as follows:

> A. Teachers may at any time have the option of signing and delivering to the Board an assignment authorizing deduction of membership dues of the Association as per the conditions on the form devised by the Association. Such sum shall be deducted in equal installments from the regular salaries of such teachers and remitted promptly to the Association together with an accounting by source. Such deductions will begin no later than the second regular pay after notification by the Association. The Association will indemnify and save harmless the Board of Education for all sums improperly checked off and remitted to the teacher organization plus necessary and reasonable costs, including attorney's fees, incurred by the Board in connection therewith.
>
> B. It is recognized that because of religious conviction, or otherwise, some teachers object to joining an organization engaged in collective bargaining. At the same time, it is recognized that the proper negotiation

> and administration of collective bargaining agreements entail expenses which are appropriately shared by all teachers who are the beneficiaries of such agreements. To this end, in the event a teacher shall not join the Association and execute an authorization for dues deduction in accordance with Section A of this ARTICLE, such teachers shall, as a condition of continued employment by the Board, cause to be paid to the Association a sum equivalent to the dues and assessments referred to in Section A. In the event that such sum remain unpaid for a period of thirty [30] days following the commencement of employment of the teacher, the Board agrees that in order to effectuate the purposes of the Public Employment Relations Act and this Agreement, the services of such teachers shall be discontinued. The refusal of the teacher to contribute fairly to the costs of negotiation and administration of this and subsequent agreements is recognized by the parties as reasonable and just cause for termination of employment.

The clause in paragraph B which calls for payment of a "sum equivalent to the dues and assessments referred to in Section A" is illegal for the simple reason that the Michigan legislature made clear in its 1973 amendments to PERA that agency-shop agreements are permissible only to the extent that they require of nonunion employees the payment of a "service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative." PERA Section 10(1)(c). Judge Sperka has given a thorough interpretation of this statutory language in *Teamsters, Local* 328 *v Starrine,* 1976 MERC Lab Op 167, 170. The Commission approved his determination that "under the 1973 amendment to PERA, payment of initiation fees cannot be made a condition of employment" 1976 MERC Lab Op 167. On the same reasoning set forth in *Teamsters, Local 328* we hereby determine that assessments, like initiation fees, cannot be subsumed by the word

"dues" as used in the statute. Likewise, the payment of assessments, as specified in the contract between GCEA and Garden City School Board, cannot be made a condition of employment.

The distinction between "dues" and "assessments" is well established in the labor law lexicon:

> It is clear that the term "periodic dues" in the usual and ordinary sense means the regular payments imposed for the benefits to be derived from membership to be made at fixed intervals for maintenance of the organization. An assessment, on the other hand, is a charge levied on each member in the nature of a tax or some other burden for a special purpose, not having the character of being susceptible to anticipation as a regularly recurring obligation. . . . *NLRB v Food Fair Stores,* 307 F2d; 50 LRRM 2913, 2918 (1962).

In the instant case, it is beyond dispute that GCEA dues, MEA dues, and NEA dues have been properly characterized by the parties as "dues." We think it equally clear that the one time special purpose fee levied to support striking Crestwood teachers can only be characterized as an assessment. As such, the Crestwood assessment was illegally demanded of the Charging Parties.

The Teachers Assistance Program (TAP) fees, on the other hand, were levied consistently over a four-year period for the purpose of building a strike fund. As such, these fees bear some resemblance to the usual meaning of "dues," although it happens that the TAP fee was levied over and above the regular dues required to maintain membership in GCEA and MEA and NEA. Without deciding that the TAP fee was levied as a part of regular dues or as a special assessment, and without endorsing the Administrative Law Judge's determination that the TAP fee was illegal on account of its extra-statutory purpose,

we nevertheless hold that the TAP fee was illegal as to the Charging Parties because it was administered discriminatorily. That is, the Teachers Assistance Program was actually administered so as to assist Association members only, and not all teachers potentially affected by a work stoppage. Such discriminatory use of funds uniformly exacted of Association members and agency payers alike cannot be permitted under the policy of PERA. The agency-shop concept is justified there on the grounds that nonmember employees can be required to "share fairly in the financial support of the exclusive bargaining representative," PERA, Section 10(2), but their "fair share" cannot encompass payment for benefits they are ineligible to receive.

As to Charging Parties' second attack on the facial validity of the contract, we note that the above-quoted provisions do appear to require agency payers such as the Chamberlains to remit all owing payments to the Association within 30 days of hire whereas Association members are permitted to "checkoff" their dues obligations so as to pay them over a full year. In federal jurisprudence, such disparate modes of collecting agency-shop fees and dues have been held to be an illegal inducement to join the union. *NLRB v Hospital Employees, Local 113 (Mounds Park Hospital)*, 96 LRRM 1422, *enf'd* 97 LRRM 2160 (8th Cir, 1977).

However, an initial illegality in the contract clause is actionable only if the objectionable clause continues to be enforced during the six-month period preceding the filing of charges. In *Schorr Stern Food Corp,* 227 NLRB No 245; 94 LRRM 1331 (1977), an illegal contract clause was enforced by the employer within the limitations period. The Board held that an unfair labor practice charge attacking the contract clause was timely. Here, by contrast, we have a contract clause which was arguably illegal as written but which has *not* been enforced against these Charging

Parties within the limitations period. We find that the contract may be construed and apparently was interpreted by the parties to permit agency payers to checkoff payroll deductions for "representation fees" in the same way as Association members could check off deductions for their dues. (Ch. Pty. Ex. 9 and 10). Thus, as actually applied to the Chamberlains, the contract clause specifying different modes of payment for agency payers and Association members was not administered discriminatorily.

Our holding that GCEA may validly collect dues or agency-shop payments for MEA and NEA is premised on the Commission's ruling in *Jackson v Swartz Creek,* 1971 MERC Lab Op 645. There, an agency payer objected to the payment of that part of her agency-shop fee which was turned over by the local teachers' association to the MEA and the NEA. Here, Charging Parties object to the collection of dues or agency-shop fees separately denominated as payments to the state-wide and national Associations on the basis that neither of these organizations is the collective bargaining representative of Garden City teachers. Though the record is clear that neither of the "parent" Associations has assumed the obligations of bargaining representative, the record is also clear that GCEA's internal structure demands its affiliation with the other two Associations and requires its members to simultaneously joins the state-wide and national organizations. Presumably, this fact was known to the Garden City teachers when they voted for GCEA to be their collective bargaining representative. The obligations inherent in GCEA membership include all three dues payments. It is immaterial that they are separately denominated rather than payable in one undifferential fee, as in *Swartz Creek.* Although not all three fees are dues of the exclusive bargaining representative, the fact is that all three fees are "dues uniformly required of members of the exclusive bargaining representative." It follows that the corresponding service fee may be exacted

by the sole bargaining representative in accordance with PERA, Section 10(1)(c).

A further limitation on the amount of the service fee which a labor organization may exact from nonmember public employees was announced in *Abood v Detroit Board of Educatin,* 431 US 209 (1977). In upholding Michigan's authorization of the agency shop in the public sector, the U.S. Supreme Court delineated the "service charge" which could be so exacted to "expenditures by the union for the purposes of collective bargaining, contract administration, and grievance adjustment." 431 U.S. 209, 225-26. We think it is clear that this delineation of permissible agency-shop fees must apply to any labor organization which receives agency-shop payments from public employees, whether or not such organizations have the status of sole collective bargaining representative. To the extent that Michigan Education Association provides collective bargaining support services to its local affiliates, the MEA's budget for those services may be financed from agency payer "service charges." The same is true of the state-wide and national organizations' contributions to local contract administration and grievance adjustment. However, we do not construe *Abood* to mean that MEA's agency-shop fees must be calculated only with respect to services to the Garden City affiliate. Rather, the state-wide involvement of the MEA in each of the three permissible activities for which an agency-shop fee may be levied is relevant to determining the amount of MEA's agency-shop fee. Likewise, the nation-wide involvement of NEA in collective bargaining, contract administration, and grievance adjustment is relevant to determining its agency-shop fee.

Abood implied that once a nonmember has lodged a general objection to political expenditures, the burden shifts to the unions to justify the amount of their service charges. 431 U.S. 209, 240-41. Charging Parties have adequately stated their objection in the arbitration hearings held in

October 1976 and July 1977. Hence, it was unnecessary for them to make any further showing on this issue at the hearing on this case. At any event, Administrative Law Judge Bixler quashed the subpoena relating to MEA bookkeeping, budgets and expenses. Nowhere in the record does it appear that the Respondent-Associations have attempted to justify their expenditures in response to the Chamberlains' objections.

In ordering appropriate remedies in this case, we must take note of the Michigan Court of Appeals' recent interpretation of *Abood* in *Ball v City of Detroit,* No. 22586 (Slip Op. July 5, 1978). In implementing *Abood,* the *Ball* court held that (1) the initial determination of appropriate agency-shop fees must be "adjudicated on a case-by-case basis," Slip Op. p. 8, (2) that pending such litigation, the proper way to protect objecting nonmembers is to place their service fees in escrow, (3) that annually the union shall adjust its service fee "according to fluctuations in permissible expenditures," Slip Op. p. 9, but that (4) after the initial neutral determination of the proper amount of the service fee, objecting agency payers must exhaust internal union procedures before challenging the service fee in court.

To the extent that *Ball* addresses an issue in controversy here, we must order a remedy which is consistent with that opinion. It would seem that *Ball* mandates further litigation in this case, at the opinion of the Associations, to establish the proper amount of the agency-shop fee to which they are entitled.[1] Pending such litigation, the agency-

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[1] It is possible, of course, that the Associations may choose not to litigate the proper amount of their agency-shop fees in this case. The Associations may elect to waive the claims to past-owed agency-shop fees from the Chamberlains by written notification to that effect. However, current owing fees and amounts payable in the future may not be collected from these Charging Parties until some neutral forum has adjudicated the proper amount of the

shop fees which are payable in accord with this opinion will be payable into escrow.

Finally, we do not wholly accept the Administrative Law Judge's determination of the liability of the various parties. Nor do we accept Charging Parties' contention that GCEA acted as the agent of MEA or NEA. However, at least one critical action in this case was taken by a responsible staff person of MEA. That is, Mr. Maurice Hart participated actively in the decision to file the grievance requesting discharge of the Chamberlains. We conclude that this act by Hart sufficiently implicated MEA in the whole sequence of events leading to the illegal demand for discharge as to justify imposing liability on MEA.

The same cannot be said of NEA. There is no showing that any responsible official of NEA knew of or approved the demand for discharge. Nor was Mr. Hart vested with any actual or apparent authority to act on behalf of NEA. We therefore conclude that Respondent NEA is not liable for an unfair labor practice in this case. However, Respondents GCEA and MEA are both liable for the illegal attempt to dismiss the Chamberlains.

ORDER

IT IS HEREBY ORDERED that the Garden City School District, its officers, agents, supervisors, representatives shall:

A. Cease and desist from:

1. Discriminating against employees in regard to hire, terms or other conditions of employment by maintain-

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agency-shop fee permitted under Abood. These Charging Parties have adequately stated their objection to the agency-shop fee and will not be required to renew their objections continuingly. The burden is now on the Associations to show the proper amount of the agency-shop fee to which they are entitled, either before this Commission or in a court of general jurisdiction.

ing in effect a collective bargaining agreement making the payment of union assessments a condition of employment.

B. Take the following affirmative action to remedy the unfair labor practices found herein:

1. Post copies of the attached notice to all employee's in conspicuous places at the Employer's schools at all locations where notices to employees are customarily posted for a period of twenty (20) consecutive days. One signed copy of the notice shall be returned to the Commission and reasonable steps taken by the Employer to see that said notice is not altered, defaced or covered by any other material.

2. Notify the Michigan Employment Relations Commission within twenty (20) days of receipt of this Order or any other subsequent order of the Commission regarding the steps the Employer has taken to comply therewith.

IT IS HEREBY ORDERED that the Garden City Education Association, its officers, agents, or representatives shall:

A. Cease and desist from:

1. Restraining or coercing employees in the rights guaranteed in Section 9 of the Public Employment Relations Act.

2. Causing or attempting to cause a public employer to discriminate against a public employee in violation of PERA, Section 10(1)(c) by causing or attempting to cause a public employer to discharge employees because they have failed to pay any payment other than an equivalent fee uniformly required of members as dues.

3. Causing or attempting to cause a public employer to discriminate against public employees because they

have failed to pay except into escrow any fees in lieu of dues which have not already been adjudicated to be permissible fees under the Supreme Court's decision in *Abood v Detroit Board of Education,* 431 US 209 (1977).

B. Take the following affirmative action to remedy the unfair labor practices found herein:

1. Notify the Garden City School District that the Garden City Education Association has no objection to the employment of Paul E. Chamberlain or Lore M. Chamberlain.

2. Notify Paul E. Chamberlain and Lore M. Chamberlain that the Garden City Education Association does not require them to pay the $75 Crestwood assessment or the $10 Teachers Assistance Program fee as a condition of employment.

3. Cease and desist from maintaining in effect any collective bargaining agreement with the Garden City School District that requires as a condition of employment that employees pay any assessments.

4. Post copies of the attached notice to all teachers of the Garden City School District where notices to teachers are usually posted for a period of twenty (20) consecutive days. One signed copy of the notice shall be returned to the Commission and reasonable steps taken by the Garden City Education Assocation to see that said notice is not altered, defaced or covered by any other material.

5. Notify the Michigan Employment Relations Commission within twenty (20) consecutive days of receipt of this order of any subsequent order of the Commission, the steps the Garden City Education Association has taken to comply herewith.

IT IS HEREBY ORDERED that the Michigan Education Association, its officers, agents, or representatives shall:

A. Cease and desist from:

1. Restraining or coercing employees in the rights guaranteed in Section 9 of the Public Employment Relations Act.

2. Causing or attempting to cause a public employer to discriminate against a public employee in violation of PERA, Section 10(1)(c) by causing or attempting to cause a public employer to discharge employees because they have failed to pay any payment other than an equivalent fee uniformly required of members as dues.

3. Causing or attempting to cause a public employer to discriminate against public employees because they have failed to pay, except into escrow, any fees in lieu of dues which have not already been adjudicated to be permissible fees under the Supreme Court's decision in *Abood v Detroit Board of Education,* 431 U.S. 209 (1977).

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Charles M. Rehmus, Chairman
Morris Milmet, Member

Dated: October 19, 1978

[Notice to all teachers omitted]

In the Matter of:
GARDEN CITY SCHOOL DISTRICT,
Respondent-Employer,
-and- Case Nos. C76 J-344
GARDEN CITY EDUCATION CU76 J-45
ASSOCIATION, and CU76 J-46
MICHIGAN EDUCATION ASSOCIATION, and
NATIONAL EDUCATION ASSOCIATION,
Respondent-Association,
-and-
PAUL E. CHAMBERLAIN and
LORE M. CHAMBERLAIN, Individuals,
Charging Parties.

[as officially reported in 1982 MERC Lab. Op. 1282]

DECISION ON PETITION FOR REHEARING AND CLARIFICATION

Respondents Garden City Education Association, Michigan Education Association, and National Education Association have petitioned for a rehearing and clarification of the Commission's Decision and Order in the above-entitled case dated October 19, 1978.

The undersigned have considered each of the arguments raised by the Respondents in support of their petition. We have concluded (1) that Respondents have not suggested there is any newly discovered evidence relevant to the time period covered by the charges in this case, (2) that the Commission's original decision is based on substantial, competent, and material evidence on the whole record, and (3) that the Commission considered and addressed each of the legal arguments adduced by Respondents in their Brief on Exception. Finally, the Commisson in its original opinion made a correct application of the current law including *Ball v City of Detroit,* 84 Mich App 383 (1978).

Office-Supreme Court, U.S.
FILED
OCT 5 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-361

IN THE

Supreme Court of the United States

October Term, 1984

DAVID E. KEMPNER,

Appellant,

v.

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO

and

METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Appellees.

On Appeal From The Court Of Appeals
Of Michigan

APPELLEES' MOTION TO DISMISS

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

IS DUE PROCESS OF LAW DENIED, AND ARE THE FIRST AMENDMENT FREEDOMS OF ASSOCIATION AND PETITION IMPERMISSIBLY ABRIDGED, BY A STATE'S PUBLIC-SECTOR AGENCY SHOP STATUTORY PROVISIONS WHICH, AS APPLIED BY THE STATE'S ADMINISTRATIVE AGENCIES AND COURTS, REQUIRE OBJECTING NON-MEMBER SERVICE FEE PAYORS TO EXHAUST INTERNAL UNION PROCEDURES TO RECEIVE THEIR FINALLY CALCULATED UNION REDUCTION OF SERVICE FEE, AS A PRE-CONDITION TO SECURING STATE ADMINISTRATIVE AGENCY AND COURT REVIEW OF THEIR ALLEGED STATUTORY AND/OR CONSTITUTIONAL RIGHTS?

II.

DO A STATE'S ADMINISTRATIVE AGENCIES AND COURTS PROPERLY APPLY THE STATE'S PUBLIC-SECTOR AGENCY SHOP STATUTORY PROVISIONS BY REQUIRING UNIONS, WITH REFERENCE TO OBJECTING NON-MEMBER SERVICE PAYORS, TO (a) INTERNALLY CALCULATE A PROSPECTIVE SERVICE FEE REDUCED "BY THE PERCENTAGE OF THE UNION'S ANNUAL BUDGET SPENT FOR IDEOLOGICAL OR POLITICAL PURPOSES UNRELATED TO COLLECTIVE BARGAINING" AND, IN SO DOING, MAKE "A GOOD FAITH APPLICATION OF CURRENT CASE LAW"; TO (b) THEREUPON PERMIT THE UNION TO REQUIRE "THE OBJECTING NON-MEMBER" TO "COMMENCE PAYING A REDUCED FEE" DIRECT TO THE UNION AND *NOT* INTO ESCROW: BY REQUIRING OBJECTING NON-MEMBERS, IF THEY STILL OBJECT TO THE REDUCED FEE CALCULATIONS TO (c) NEXT EXHAUST INTERNAL APPEAL PROCEDURES, BEFORE (d) THEN HAVING OPPORTUNITY TO FURTHER CHALLENGE THOSE CALCULATIONS AT THE STATE'S ADMINISTRATIVE LABOR RELATIONS AGENCY AND, THEREAFTER, IN THE STATE'S APPELLATE COURTS?[1]

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[1] Decision and Order of Michigan Employment Relations Commission, March 11, 1982, at pp. 12a-14a of Jurisdictional Statement.

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No. 84-361

IN THE

Supreme Court of the United States

October Term, 1984

DAVID E. KEMPNER,

Appellant,

v.

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO

and

METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,

Appellees.

On Appeal From The Court Of Appeals
Of Michigan

MOTION TO DISMISS

Appellees, pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, move the court to dismiss the appeal herein on the following grounds:

1. The appeal does not present a substantial federal question.

2. The Decision and Order of the Michigan Employment Relations Commission rests on an adequate non-federal basis.

COUNTER-STATEMENT OF THE CASE

Ms. Christine D'Alleva became employed by the City of Dearborn on or about August 23, 1976; she was employed in a bargaining unit represented by AFSCME's Local 2077. The City and the Union had collective bargaining agreements which required the payment of agency shop fees equivalent to union dues. Ms. D'Alleva refused to pay either the union dues or agency shop fees.

On February 17, 1977, the local union president "pro forma" requested that Ms. D'Alleva be discharged for failure to pay service fees. The City took no action on the Union's request. Finally, after a couple of years, the City and the Union finally agreed to submit the issue to voluntary arbitration before George T. Roumell, Jr., a Detroit lawyer who works virtually full-time as a labor arbitrator. Mr. Roumell (as of this date, October, 1984) is the partner of Wallace Riley, the immediate Past President of the American Bar Association, and Mr. Roumell is, himself, the President-Elect of the State Bar of Michigan.

Reaching arbitration on June 6, 1979, Mr. Roumell, on August 28, 1979, issued an Arbitrator's Opinion and Award, saying in relevant part:

1. "The grievance is denied insofar as termination . . . is concerned."

2. "Christine D'Alleva shall pay to the Union a service fee per month for the period September 23, 1976 to the present and in the future which represents the proportion of Union expenditures related to 'contract administration', 'collective bargaining', and 'grievance adjustment' . . . ."

3. "Within thirty days . . . the Union shall calculate and present the Arbitrator and Ms. D'Alleva

> . . . the figures representing the proportion of service fee . . . for the period of September 23, 1976 to present, and estimated for next year. This provision of the Award will be satisfied if the Union presents the same calculations as presented to the City of Detroit following the decision in *Ball* v *City of Detroit*, 84 Mich. App. 383 (1978)."[2]

Subsequent to the Arbitrator's August 28 Opinion and Award, the undersigned attorney for the Union wrote to Mr. Roumell to report that no revised calculations had yet been presented in the *Ball* case, but that:

> ". . . , my clients and I are willing to do as follows, however. We enclose herewith a xerox copy showing the final rebate percentages for the International union for the period July, 1972 to December 31, 1977. In addition to that recapitulation, we understand that the International's rebate for calendar year 1978 has been computed as being at 8.79%. Dividing those percentages by the 7 time frames in question, comes up with an average percentage of final rebate for the International Union, in the amount of 6.6%.
>
> Although the Council and the Local Union are servicing organizations, to a much greater extent than the International Union; and although, the International Union spends a much greater percentage of its monies on legislative activities and organizational activity, as compared to either the Council or the Local Union, we are willing that the 6.6% be applied to the total dues or service fee being paid, or to be paid in the future (at least until *Ball* is resolved), by Ms. D'Alleva.

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[2] Michigan Employment Relations Commission (hereinafter MERC) Joint Exhibit 11.

If this suggestion is satisfactory to the Arbitrator, I note that you have retained jurisdiction 'to rule on any questions concerning (the) Award', and I would assume that you could amend or supplement your Award consistent with this proposal.

* * *

A REVIEW OF AFSCME INTERNATIONAL REBATES UNDER ARTICLE IX, SECTION 10 OF AFSCME INTERNATIONAL CONSTITUTION 1973-1978

Period	Per Cap	No. Requests	Calculations		Final Rebate		
7/1/72 to 6/30/73	$18.00	c. 50	$ .83	4.63%	$ .83	No Appeal	4.6%
7/1/73 to 6/30/74	$18.00	83	$ .86	4.78%	$2.02		11.0%
7/1/74 to 6/30/75	$21.75	64	$ .57	2.62%	$ .57	No Appeal	2.62%
7/1/75 to 6/30/76	$27.30	110	$ .88	3.22%	$1.77		6.48%
7/1/76 to 12/31/76	$14.40	88	$ .94	6.55%	$ .94	No Appeal	6.5%
1/1/77 to 12/31/77	$34.80	495	$2.16	6.22%	$2.16	Appeal Withdrawn" [3]	6.2%

The arbitrator responded to Maurer's September 20 letter (and other correspondence from Ms. D'Alleva) by setting a further hearing for October 31, 1979. At that hearing, the International Union's non-member rebate review procedure was explained.[4] It was noted during the arbitration hearing that, on September 1, 1977, the International Union's Review Panel issued a lengthy decision, for example, reviewing the fiscal 1973-74 rebate figure and setting guidelines and principles for the future. The Review Panel declared that the rebate for that 1973-74 year should be 11% of international union per capita dues. The Review Panel then consisted of Chairperson

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[3] MERC Joint Exhibit 12, Maurer's letter of September 20, 1979 to Arbitrator Roumell.

[4] See Article XII, AFSCME International Constitution, Appendix F, pp 53a-54a, Jurisdictional Statement herein.

Ronald W. Haughton (former Wayne State University Vice-President and later Chairperson and now member of the Federal Labor Relations Authority); member Harry T. Edwards (former law professor at Harvard and the University of Michigan, and now a Judge of the Court of Appeals for the District of Columbia Circuit); and member David A. Morse (former U.S. Assistant Secretary of Labor; former General Counsel of the National Labor Relations Board; former Director-General of the International Labor Organization, Geneva, Switzerland).

On December 4, 1979, Arbitrator Roumell issued a Supplemental Opinion and Award. He noted that the Union "agreed to waive all service fees prior to July 1, 1977" (i.e. from September 23, 1976 to July 1, 1977). He noted that total dues were $8.00 per month ($2.40 to AFSCME International, $4.00 to the servicing Council, and $1.60 to the local union) from September 23, 1976 to June 1, 1979, and $9.00 per month thereafter. He noted that, during the October 31 hearing, the Union proposed and Ms. D'Alleva accepted a 6.6% "rebate" or reduction figure, but that Ms. D'Alleva objected to any retroactivity at all. He noted that the Union was agreed that payment, (retroactive only to July 1, 1977, and thereafter payable at only 93.4% of regular dues), those back payments could be made in 12 equal future monthly installments *to the Union* (along with payment of future current monthly dues at the 93.4% rate). The Arbitrator thus concluded that Ms. D'Alleva owed back service fee of $229.74 (24 months, 6/1/77-5/31/79, times $7.47 [$8.00 minus 6.6%] equals $179.28, plus 6 months, 6/1/79-11/30/79, times $8.41 [$9.00 minus 6.6%] equals $50.46). The Arbitrator noted that November service fee was not due and payable until after December 4, 1979, and he thus directed:

> "1. Ms. Christine D'Alleva owes $229.74 in retroactive service fees to Local 2077 . . . .

2. The retroactivity is to be paid beginning January 2, 1980, with payment due by the 20th of each month in eleven equal installments of $19.15, and a final installment of $19.09.

3. Ms. Christine D'Alleva is to pay the current December 1979 service fee by December 20, 1979, to Local 2077. . . . said service fee will be $8.41, based upon the 6.6 percent adjustment agreed to between Local 2077 and Christine D'Alleva . . . .

* * *

4. As to the service fees in the future beyond December 1979, said service fee may be adjusted from time to time by Local 2077 to reflect the costs of contract administration, collective bargaining and grievance adjustments as set forth in *Ball* v *Detroit*, 84 Mich App 383 (1978). In the event that Christine D'Alleva objects to the calculations, she is to utilize the appeal procedure for said objection established by the American Federation of State, County and Municipal Employees . . . ."[5]

Thus, by Union agreement and arbitral award, Ms. D'Alleva in the instant case was given not only a prospective rebate on future dues or service fee, but that same "rebate" was applied to 30 past months of unpaid service fee on top of which an additional 9 past months of unpaid service fee was completely, 100% waived. The Union neither sought nor was awarded interest on the past, unpaid service fee.

On December 4, 1979, counsel of record herein, Mr. Chappell, undertook representation of Ms. D'Alleva and

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[5] MERC Joint Exhibit 16.

refused on her behalf to make any payment of past, present or future service fee except into an escrow account.[6] The Union refused to join into such an escrow arrangement and, on January 22, 1980, Mr. Chappell and his local counsel, Mr. Kempner, unilaterally opened an "escrow" account at Detroit's City National Bank for Ms. D'Alleva, depositing $125.25 into said account ($100.00 down payment . . . , plus $9.00 for the January, 1980 service fees, plus $16.25 [one-twelfth of the remaining January 1, 1977 to December 31, 1979 service fees].)[7]

Effective July 15, 1981, Ms. D'Alleva resigned her position with the City of Dearborn "to accept other employment". Presumably, Mr. Chappell arranged other "escrow" payments on her behalf between January, 1980 and July, 1981; the Union has received no such payments, however, and, in fact, has never gotten a single penny from Ms. D'Alleva as relates to her nearly 5 years of union-represented employment.

ARGUMENT

This case represents total service fee (at 100% payment) of about $513.00 (from August 23, 1976 to July 16, 1981). Of that amount, by Union agreement and arbitral award, "rebates" (if that's the proper term to apply to *past, unpaid* service fees) and waived service fee of about $101.10 had already been gained by Ms. D'Alleva, or nearly 20% of total service fee dollars.

QUESTION I

The question of alleged constitutional violation because of required utilization of internal union procedures is adequately answered by the recent August 2, 1984 deci-

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[6] MERC Joint Exhibit 17.

[7] MERC Joint Exhibit 18, and MERC Transcript of February 4, 1980, at p. 28.

sion of a Magistrate sitting in the U.S. District Court for the Northern District of Ohio. In the case of *Tierney* v *City of Toledo*, 116 LRRM 3475, involving application of the Toledo Municipal Code's agency shop provision, it was held:

> "Plaintiffs' remaining contention that their due process rights are violated by requiring them to utilize an internal union procedure to receive their final refund from the TPPA does not appear to be supported by authority. A due process hearing need not take the form of a judicial proceeding. An administrative hearing with an impartial decision maker may suffice. See *Kennerly* v *United States*, 721 F.2d 1252, 1254 (9th Cir. 1983); *Wolkenstein, supra*, 694 F.2d at 41. The fact that the procedure is an internal union procedure does not make it inherently unfair. See *Hudson* v *Chicago Teachers Union, Local No. 1*, 573 F.Supp. 1505, 1516 (N.D. Ill. 1983). Indeed, in *Brotherhood of Railway Clerks* v *Allen*, 373 U.S. 113, 53 LRRM 2128 (1963), the Supreme Court suggested that unions consider the adoption by their membership of some voluntary plan by which fee paying dissenters would be afforded an internal union remedy. Id. at 122. More recently, in *Abood, supra*, without expressing a view as to the constitutionality of the internal remedy involved, the Court suggested that disputes over dissenting payors' fees should be referred to an internal union remedy as a possible means of settling any discord. Id. at 242. In light of these suggestions by the Supreme Court, this court is not presently inclined to hold that the internal union procedure herein is inherently unfair or in violation of due process."

Of course, in the instant case the facts involved an arbitral procedure, with an arbitrator jointly selected by the

City employer and the Union. As to such arbitration procedures, the Ohio magistrate noted:

> "Plaintiffs' contention that the arbitration process contained in the rebate procedure violates the Due Process Clause of the Fourteenth Amendment would also appear to be lacking in merit. In making this contention, the plaintiffs place substantial reliance upon the Supreme Court's recent decision in *McDonald* v *City of West Branch*, 466 U.S. __, 104 S.Ct. 1799, 115 LRRM 3646 (1984), for the proposition that private arbitrators never have any power or right to make fact findings or to determine legal issues of constitutional magnitude. While the plaintiffs' interpretation of *McDonald, supra*, is interesting, it is incorrect. In that case, the Supreme Court held merely that an unappealed arbitration decision would not be afforded res judicata or collateral estoppel effect when a civil rights action is brought to challenge it in a federal court. Id. at 1803. In so holding, the Court implied that arbitrators could pass upon matters effecting constitutional rights, but that their holdings or factual findings upon such matters would not be given preclusive effect."[8]

QUESTION II

As to the broader questions of prospective versus retroactive or "pure" rebates, escrow or no escrow, and

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[8] Compare the September 6, 1984 decision of the U.S. Court of Appeals for the Seventh Circuit, reversing *Hudson, et al.* v *Chicago Teachers Union Local No. 1, et al.*; note, however, that the Seventh Circuit says, in its opinion:

> "In *Robinson* v. *New Jersey*, the Third Circuit found that a 15 percent advance reduction for nonmembers of the union provided a sufficient cushion to protect them. * * * Here the advance reduction was only 5 percent."

In our instant case, the nonmember was offered and awarded a 20 percent reduction for total years of service.

types of or standards for rebatable expenditures, the Supreme Court decision in *Ellis* obviously answers some of those questions in the context of judicial interpretation of a federal statute. As the *Ellis* decision made clear, however, most issues were being decided on statutory grounds (involving the union security provisions of the Railway Labor Act) rather than on constitutional grounds.

As to whether or not *Ellis* holds that a rebate-only scheme is a statutory (Railway Labor Act) violation, or a constitutional violation, is a matter upon which there can be disagreement. A fair reading of *Ellis*, we think, permits one to conclude that it holds that a "rebate only" procedure is a statutory violation. The U.S. Court of Appeals for the Third Circuit, in its recent August 6, 1984 decision in *Robinson* v *New Jersey* reads *Ellis* as saying "a pure rebate system" is a constitutional violation.

In any event, in our instant case we would first note that neither the facts nor the appealed rulings involved a "pure rebate" system or "rebate only" system. To the contrary, with 9 months of 100% waived fees and 30 months of 6.6% reduced fees, the facts involved nearly a 30% "prospective" reduction as of December, 1979, and a 20% "prospective" reduction during the entire 5 year term of appellant's employment. The reduction was only theoretically "prospective" because, in fact, the objecting employee never, to this day, has paid anything to the Union, but has instead paid into some unilaterally established escrow account (established only after being arbitrally directed to pay the reduced sum directly to the Union). The appealed Decision and Order of the Michigan Employment Relations Commission spoke, as well, only to a prospectively reduced service fee, etc.

Thus, if *Ellis* addressed the issue of "rebate only" systems on constitutional grounds, we urge that the instant case does meet the "constitutional" standards enunciated by *Ellis*.

We would note further, however, that, although unnecessary to disposition of this Motion to Dismiss, the very Michigan statutory provision under consideration now, has previously been considered by this Court in *Abood* and there addressed in terms of constitutional considerations, little over 7 years ago. To the extent, if any, that *Ellis* is inconsistent with *Abood*, which decision should govern the state law, statutory agency shop provisions in Michigan? Suffice it to say for the present moment that Michigan's 1973 legislative history of the agency shop provision amendments is distinctly different than the 1950 Railway Labor Act union security amendment legislative history discussed in *Ellis*. In this context, we would also note that a number of legislative bodies, relying upon their reading of *Abood* and its predecessors, passed local laws that provided for retroactive rebates or refunds:

1. Massachusetts General Law, c. 150E, § 12, as interpreted by the Massachusetts Supreme Court on December 22, 1983 in *Therrien et al* v *Labor Relations Comm.*, 459 N.E. 2d 88.

2. New York Civil Service Law § 208, subd. 3, ¶ [a], as interpreted by the New York intermediate appellate courts in *United University Professions* v *Newman*, 446 N.Y.S. 2d 596 (N.Y. App. Div., 1982); 80 App. Div. 2d 23 (N.Y. App. Div., 1981); 430 N.Y.S. 2d 704 (N.Y. App. Div., 1980); and as interpreted by New York trial judges in *Haag* v *Hogue*, 456 N.Y.S. 2d 978 (Sup. Ct., Monroe County, 1982); and *Warner* v *Board of Education*, 104 Misc. 2d 1021 (Sup. Ct., Monroe County, 1980).

3. Hawaii's H.R.S. § 89-4(a), as interpreted by the Hawaii Supreme Court in *Aio* v *Hamada*, 664 P. 2d 727 (Hawaii, 1983).

4. An interpretation of the Indiana Certificated Educational Employee Bargaining Act, Ind. Stat. Ann. 20-7.5-1-1, *et seq.*, as interpreted by Indiana's intermediate Court of Appeals in *New Prairie Classroom Teachers* v *Stewart*, 460 N.E. 2d 149 (Ind. App., 1983); and *Fort Wayne Education Ass'n* v *Goetz*, 443 N.E. 2d 364 (Ind. App., 1982).

5. Ohio Revised Code § 4117.09 [c] and interpretations of earlier Ohio law in *Jefferson Area Teachers Ass'n* v *Lockwood*, 69 Ohio St. 2d 671, 433 N.E. 2d 604 (1982).

6. California's Gov. Code § 3518.8, as interpreted in *Champion* v *State of Calif.*, 738 F. 2d 1082 (9th Cir., 1984), and interpretations of earlier California law by its intermediate appellate courts in *Link* v *Antioch Unified School Dist.*, 191 Cal. Reptr. 264 (Cal. App., 1983); *San Lorenzo Educ. Ass'n* v *Wilson*, 179 Cal. Reptr. 25 (Cal. App., 1981); and *Leek* v *Washington Unified School Dist.*, 124 Cal. App. 3d 41 (Cal. App., 1981).

7. Illinois P.A. 1014, L. 1983, § 11, (S.H. Ill. Ann. Stat. Ch. 48, ¶ 1711), effective January 1, 1984, and Illinois P.A. 1012, L. 1983, (S.H. Ill. Ann. Stat. Ch. 48, ¶ 1606[e]), effective July 1, 1984.

8. Oregon's Ore. Rev. Stat. § 243.650(10) and (16), as interpreted by its intermediate appellate court in *Siegel* v *Gresham Grade Teachers Ass'n*, 32 Ore. App. 551, 574 P. 2d 692 (1978), and *Carlson* v *City of Portland*, 45 Ore. App. 439, 608 P. 2d 1198 (1980).

9. Wisconsin's state and municipal employment labor relations' acts, Wis. Stat. Ann. §§ 111.70(2) and 111.85, as interpreted by its Supreme Court in *Berns* v *Wisc. Employment Rel. Comm.*, 99 Wis. 2d 252, 299 N.W. 2d 248 (1980); and *Browne* v *Milwaukee Bd. of School Directors*, 83 Wis. 2d 316, 265 N.W. 2d 559 (1978).

The foregoing represents some nine different states, plus the State of Washington (as noted in *Ellis* footnote 7, in the case of *Association of Capitol Powerhouse Engineers* v *State*, 89 Wash. 2d 177, 570 P. 2d 1042 [1972]), and the State of Michigan (whose court interpretations of relevant statutory provisions can be found in *Detroit Bd. of Ed.* v *Parks*, 417 Mich. 268, 335 N.W. 2d 641 [1983]; *Dudkin* v *Civil Service Comm.*, 127 Mich. App. 397, 339 N.W. 2d 190 [1983]; *White Cloud Ed. Ass'n* v *Board of Ed.*, 101 Mich. App. 309, 300 N.W. 2d 551 [1980]; *Eastern Mich. AAUP* v *Morgan*, 100 Mich App. 219, 298 N.W. 2d 886 [1980]).

Thus, if the view of the law espoused by counsel for appellant were adopted by this Court, the state and local laws of some 11 different states, as interpreted by their courts, would be severely impacted if not indeed deemed unlawful. The result of such can, perhaps, be best illustrated by a recent decision and a supplemental decision of Robben W. Fleming. Dr. Fleming is currently a Professor of Labor Law at the University of Michigan. Previously, for some 12 years, he had served as President of the University of Michigan, and, before that as Chancellor and Professor of Law at the University of Wisconsin, as Professor of Law at the University of Illinois, and, before that, as Director of the Institutes of Labor and Industrial Relations at the Universities of Illinois and Wisconsin. Dr. Fleming also was recently appointed by the Michigan State Employees Association (hereinafter

MSEA) as Chairperson of its Citizens Review Committee, which is MSEA's final internal appellate tribunal governing its agency fee procedures. (Procedures involving Michigan's state civil service employees are not caught by general State legislation due to a ruling of the Michigan Supreme Court, some years ago, that the State's Civil Service Commission is a constitutionally autonomous body; those procedures are, instead, covered by Civil Service Rule.) In an initial decision issued on March 26, 1984, Professor Fleming noted:

> "Section 6-7 of the Rules of the Civil Service Commission authorizes the parties to a collective bargaining agreement to include in their contract a so-called 'Representation Service Fee' under which the parties may require, as a condition of continuing employment, 'that all employees in the unit pay to the exclusive representative a service fee representing the employees' proportionate share of the costs of exclusive representation.' The rules further provide that: 'Such costs shall not include fees, charges or assessments involving political contributions or for other purposes not directly related to the costs of representation under this rule and related procedures."

With reference to a retroactive rebate procedure, on March 26, Professor Fleming originally wrote:

> "Though there is some complaint on the part of either individual objectors or the National Right to Work Legal Defense Foundation to a retroactive rebate procedure rather than an immediate reduction in the representation fee, it does not seem possible at this point in time to do anything other than tender a rebate. It may be that with a little experience the Association can identify a percentage reduction which will accommodate all

rebatable items and therefore make a flat reduction possible. This may, in fact, be a wise approach."

In supplemental decision issued on June 28, 1984, Professor Fleming now wrote:

"On March 26, 1984, acting in my capacity as Chairman of the Citizens Review Board of the Michigan State Employees Association, I rendered a decision as to the rebatability of certain challenged items under the agency shop provision of the MSEA-State of Michigan collective bargaining contract. At the time of that decision there was pending before the Supreme Court of the United States the case of *Howard Eilis, et al, Petitioners* v. *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, et al,* 80 L. Ed 2d 428 (1984). That case was decided on April 25, 1984, and, as predicted, that decision now requires a review of the holding I made on behalf of the Citizens Review Committee in March.

In conducting the review, it is important to remember that there are two separate approaches which require consideration. One involves the question of whether the First Amendment rights of the non-members have been violated; the other is whether the language of the applicable statute in any way applies to the situation at hand. In the *Ellis* case the Supreme Court was dealing with the language of the federal Railway Labor Act, as amended in 1951. In the instant case we are dealing with Civil Service Commission rules of the State of Michigan which were enacted as the result of authorizing legislation. Thus the decision of the Supreme Court in *Ellis* is not applicable in-

sofar as it relies on the language of the Railway Labor Act for the decision. As to the proper interpretation of the United States Constitution, the Supreme Court is, of course the final authority."

* * *

"In the original decision of the Citizens Review Board, I had held that an after-the-fact rebate procedure was allowable, though I suggested that 'maybe with a little experience the Association can identify a percentage reduction which will accommodate all rebatable items . . . .'

While admitting that the lower courts were divided on the adequacy of a delayed rebate approach, the Supreme Court held that an after-the-fact rebate approach was inadequate. In its place the Court suggested 'readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts . . . .'

Though the Court seems to have grounded its decision in the statute it was considering, it is clearly desirable that there be uniformity of treatment in handling rebates, and I therefore amend the original decision of the Citizens Review Board to make it comply with the Court's decision in the *Ellis* case. That portion of the original decision is remanded to the Association in order to give it an opportunity to adopt an alternative which will conform to the Supreme Court's determination."

In terms of Professor Fleming's remarks, we would note that it is one thing to require a three-member state civil service commission to change its rules and/or to require a 20,000-member independent state employees' association to change its procedures. It is quite another matter, however, to try to have legislative bodies in some

11 different states change their laws. If the United States Constitution, as interpreted by the Supreme Court, requires same, so be it. Before so deciding, however, we would urge that the exaggerated arguments of counsel for appellant, in the present case, be substantially disregarded.

Finally, we would repeat briefly again that, regardless of whether or not *Ellis* applies to consideration of *state* statutory provisions, the essence of this present case, factually and legally, is that there was not a mere "after-the-fact rebate procedure or scheme". There was an advance reduction of dues proposed. There is, we would urge, no constitutional requirement of *both* an advance reduction of dues *and* a 100% escrow of the reduced balance, as counsel for appellant, in effect, assert in their Jurisdictional Statement. We would urge that a prospective reduction, coupled with a retroactive rebate of any *de minimus* contested amount, if any, satisfies constitutional requirements.

CONCLUSION

We would respectfully urge that the instant matter presents no substantial federal question, and rests on an adequate nonfederal basis, and counsel for appellees respectfully prays that this appeal be dismissed.

Respectfully submitted,

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No. 84-361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DAVID E. KEMPNER,

Appellant,

v.

DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY, TECHNICAL AND PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO and METROPOLITAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,

Appellees.

On Appeal From the Court of Appeals of Michigan

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Pursuant to Rule 16.5 of the Rules of this Court, Appellant David E. Kempner hereby opposes Appellees' motion to dismiss this appeal.

ARGUMENT

The motion to dismiss filed by Appellee Local 2077 and its affiliate Council 25 ("the union") says little, if anything, on the merits. Instead, it attempts to confuse and obscure the important questions presented in this appeal by asserting a series of nonsequiturs and misleading irrelevancies, distorting the record, and blatantly mispresenting the law.

Two grounds are stated for the union's motion to dismiss: (1) that the appeal does not present a substantial federal question, and (2) that the rulings below rest on an adequate nonfederal basis. No support whatsoever is offered for the latter claim, and it is patently absurd since this case was decided on constitutional grounds by both the Michigan Employment Relations Commission ("MERC"), App. B at 14a,[1] and the Court of Appeals, App. A at 5a-8a. The former claim has no merit given the clear authority cited in Appellant's Jurisdictional Statement, this Court's own decision in *Ellis v. Railway Clerks,* —— U.S. ——, 104 S. Ct. 1883 (1984), as well as such key post-*Ellis* rulings as *Hudson v. Chicago Teachers Union,* —— F.2d ——, 117 L.R.R.M. 2314 (7th Cir. Sept. 6, 1984).

The *Hudson* decision is particularly important because it addresses both of the issues presented in this appeal. The Seventh Circuit first ruled that forced

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[1] Appendix ("App.") references are to the appendices to the Jurisdictional Statement.

utilization of an intra-union rebate scheme violated the plaintiffs' due process rights. 117 L.R.R.M. 2319-2320. Judge Posner began his analysis by observing:

> The most conspicuous feature of the procedure is that from start to finish it is entirely controlled by the union, which is an interested party, since it is the recipient of the agency fees paid by the dissenting employees. . . . It is not surprising therefore that some of the plaintiffs thought it futile to even ask the union to reduce the fee.

Id. at 2319 (citations omitted).

The fact that the last step in the rebate scheme was an appeal to an arbitrator did not lessen the violations since the arbitrator was selected by the union. This point was illustrated by a most apt analogy:

> There are 15 federal district judges in active service in the Northern District of Illinois, all unimpeachably accredited; and yet the union would not try to defend a procedure that let it (or the dissenters!) pick the judge to preside in this case. . . .

Id. (citations omitted). The arbitrator's "financial interest in deciding cases favorably to the union"[2] made the situation "even more troublesome."

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[2] A recent decision of the Michigan Court of Appeals is pertinent to this point. In *Albion Public Schools v. Albion Educ. Ass'n/MEA/NEA*, 130 Mich. App. 698, 700-703, 344 N.W.2d 55, 57-58 (1983), the court affirmed a ruling that an arbitrator's services on the Michigan Education Association's rebate panel were "consultive" in nature and therefore "likely [to] create a presumption of bias in the mind of a person reviewing his qualifications as arbitrator." As in *Hudson* and the instant case, the members of the panel "were selected solely by the [union]" and their employment was "not as a pure or typical arbitrator."

This Court's decision in *McDonald v. City of West Branch,* —— U.S. ——, 104 S. Ct. 1799 (1984), provided another basis for the Seventh Circuit's holding that the union rebate scheme in *Hudson* was constitutionally inadequate.

> [*McDonald*] suggests that the Supreme Court doubts the competence of arbitrators—whose area of expertise, after all, is the interpretation of contracts rather than interpretation of the Constitution—to make First Amendment determinations. . . . But that is what the arbitrator would have to do in any case where the dissenter objected that the agency fee that he was forced to pay was being used for impermissible political and ideological purposes.

Id. at 2320 (citations omitted). Therefore, the Seventh Circuit suggested that the "constitutional minimum" in agency shop cases would be a procedure incorporating fair notice, a prompt administrative hearing before a state or local agency with the usual evidentiary safeguards, and a right to judicial review of that agency's decision. *Id.*

The second major holding in *Hudson,* 117 L.R.R.M. at 2320-21, involved the right to escrow disputed agency fees pending a governmental adjudication of the constitutionally proper amount. The procedure in *Hudson* like the one at issue called for an initial reduction of the agency shop fee by the union. Nevertheless, the Seventh Circuit agreed with the plaintiffs that this scheme was still constitutionally deficient under *Ellis,* 104 S. Ct. at 1890.

> It is true that in *Ellis* the union had made no effort to determine in advance what fraction of its dues were not pertinent to collective bargaining and therefore should not be charged to objecting non-

> members. But this is an *immaterial difference,* at least on the facts of this case. *A union cannot just choose some level of agency fee and, if it chooses too high, have the use, interest free, of the excess that it is later ordered to refund, until it refunds it.*

Hudson, 117 L.R.R.M. 2320 (emphasis added); *see also Robinson v. New Jersey,* 741 F.2d 599, 616-619 (3rd Cir. 1984) (Sloviter, dissenting).

While not raised in the union's motion to dismiss, it is appropriate to comment briefly on the recent summary dismissal of the appeal in *Jibson v. White Cloud Educ. Ass'n,* No. 83-1816, 53 U.S.L.W. 3268 (October 9, 1984). Whatever the reasons for the Court's decision that action is not binding upon the Court in this case. 12 MOORE'S FEDERAL PRACTICE, ¶ 400.05-1, pp. 4-22 through 4-25 (1982). Furthermore, since *Jibson* did not involve exhaustion of intra-union remedies, that question is still completely open. The two cases are also distinguishable for several other reasons.

First, the lower court in *Jibson* determined that escrow was unnecessary because there would be an expedited judicial determination of the correct amount of the fee. The sparse record did not show that any disputed fees would be spent by the union while those procedures were taking place. In the instant appeal, however, an administrative determination of appellant's unfair labor practice charge was denied pending total exhaustion of the union's rebate scheme. This could take many years, as evidenced by the terms of the scheme itself, App. F. at 51a-54a, as well as by the union's motion to dismiss.[3] During this time, the union

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[3] The union states that the International Union Review Panel's decision for the 1973-74 fiscal year was not issued until September 1, 1977. Motion to Dismiss at 4.

would have the unrestricted use of Ms. D'Alleva's agency fee.

Second, in *Jibson* there was also no evidence in the record to suggest that the union's unilateral fee reduction was too small. Here, the fee reduction of 6.6%[4] would still have allowed for the union to "borrow" Ms. D'Alleva's funds for improper purposes. *See* Jurisdictional Statement at 17 n.14.

The instant case is therefore clearly distinguishable from *Jibson* and presents both the exhaustion and escrow issues on a fully developed record. In fact the opportunity to review the instant case was one of the main reasons given by the appellee in *Jibson* in support of his motion to dismiss:

> [T]he *Kempner* litigation presents a far better vehicle for clarifying . . . agency shop procedures than the instant case with its sparse record and exceedingly narrow escrow issue.
>
> * * *
>
> As evidenced by the *Kempner* decision . . ., it is apparent that significant Michigan evolution of the requirements of *Abood* has occurred since 1977 . . . [C]ontinued clarification of the law of agency shop will ultimately be necessary . . .

Jibson, Motion to Dismiss at 9,11 (June 7, 1984).

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[4] It is significant that the table on which this 6.6% figure was based shows that the union has consistently underestimated its initial rebate calculations. Moreover, even under the overly restrictive standard set forth in the International Union's Constitution ("*partisan* political or ideological purposes"), the rebate for 1973-74 was eventually increased from 4.78% to 11%. Motion to Dismiss at 4.

SPECIFIC RESPONSES TO MOTION TO DISMISS

Space limitations do not permit a point-by-point rebuttal of the union's motion to dismiss. However, a few short observations are in order:

1. All references by the union to the arbitration proceedings before Mr. Roumell are irrelevant. Ms. D'Alleva was not a party to that case; the arbitrator accepted the union's unilateral fee reduction without requiring any supporting evidence or making a finding that the 6.6% reduction was proper; and the MERC Administrative Law Judge in this case expressly ruled as a matter of state law that he was precluded from deferring to the arbitration award by the Michigan Supreme Court's holding in *Detroit Fire Fighters Ass'n v. City of Detroit,* 408 Mich. 663, 293 N.W.2d 278 (1980),[5] *see* App. B at 25a.

2. Appellees' suggestion that Ms. D'Alleva was granted a 20% rebate because the union waived its claim for agency fees prior to July 1, 1977, is simply an attempt to mislead the Court. Throughout this litigation, the focus has always been on the requirement imposed by MERC that Ms. D'Alleva pay the union 93.4% of the agency fee for the prior period covered by the union's demand and for the future.

The fact that the union chose to waive its claim for earlier fees is irrelevant. However, it is noted that while Ms. D'Alleva objected to paying these fees on contractual grounds, she did place 100% of the dis-

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[5] As noted in the Jurisdictional Statement at n.18, objecting agency fee payors are the *only* unfair labor practice litigants in Michigan who must submit their disputes to a third party before MERC will consider them. See, generally, discussion at 22-25.

puted agency fees into escrow for the period starting January 1, 1977, the beginning of the month following the end of the 90-day agency shop "grace period". App. B at 20a (Stipulation ¶ 18).

3. The *Hudson* decision obviously provides an adequate rebuttal to the union's argument on the exhaustion question.[6] Further support for appellant's position is found in *Smith v. United Trans. Union,* 39 Fed. R. Serv. 2d (Callaghan) 156, 158 (S.D. Cal. 1984) (nonmembers cannot be required to exhaust intra-union remedies); *accord Soto Segarra v. Sea-Land Service, Inc.,* 581 F.2d 291, 295 (1st Cir. 1978).

4. The confused and misleading introduction to the union's argument on the escrow issue is premised on a misreading of *Ellis, supra,*[7] and as shown already, a purposeful distortion of the facts of this case. It is also noted again that while the MERC decision did require the union to reduce its agency fee demand by 6.6%, this reduction was not considered relevant by the Court of Appeals to either the escrow or exhaustion issue. Jurisdictional Statement at 15.

5. The union's reliance on this Court's discussion of possible remedies in *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209 (1977), is clearly misplaced as noted in *Ellis,* 104 S. Ct. at 1890. The union's suggestion that

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[6] The Union's reliance in their Motion to Dismiss at 9 n.8 on the statement in *Hudson* regarding the amount of the union's unilateral fee reduction is irrelevant to the issue of exhaustion of intra-union remedies and, of course, completely contrary to the Seventh Circuit's decision on that issue.

[7] As noted by the union, even the majority decision of the Third Circuit in *Robinson, supra,* recognized the constitutional basis for the Court's rebate ruling in *Ellis.*

this Court should refrain from granting the relief suggested by appellant because such a holding might have the effect of causing other states to have to change their laws has even less merit. If the laws in other states are unconstitutional, facially or as applied, they should be struck down or interpreted consistent with the requirements of the First and Fourteenth Amendments. Even the most cursory review of the Court's decisions in such areas as redistricting, criminal procedure, capital punishment, civil rights and abortion reveals that the Court has never refrained from invalidating state laws which violate individual constitutional rights.

6. The table which appears at 11-13 of the union's motion to dismiss claims to represent the current law in a number of jurisdictions. Three (3) glaring examples should be noted for the record.

> (a) Massachusetts—The state statute does not provide for retroactive rebates as claimed by the union, and *Therrien v. Labor Relations Comm.*, 390 Mass. 644, 459 N.E.2d 88 (1983), does not deal with this issue. Instead, the controlling decision in Massachusetts on both the escrow *and* exhaustion issues is *School Comm. v. Greenfield Educ. Ass'n*, 385 Mass. 70, 82-85, 431 N.E.2d 180, 188-189 (1982). As noted in Appellant's Jurisdictional Statement at 17, 21, the state supreme court rejected any presumption of validity for a fee reduction made by a union unilaterally, and agreed that dissenting nonmembers cannot be required to exhaust an intra-union rebate scheme.[8]

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[8] Because the courts of last resort in Massachusetts and Michigan have issued conflicting decisions on these federal constitutional questions, it would also be proper to review this appeal on writ of certiorari under Sup. Ct. R. 17.1(b), as alternatively requested

(b) New York—Under the state statute, unions must establish demand and return systems as a prerequisite to receiving any agency shop fees. However, in light of this Court's decision in *Ellis, supra,* the statute has just been reinterpreted by the New York Public Employment Relations Board ("PERB") to require that the entire amount of the fee be placed in an interest-bearing escrow account while the dispute is pending. *United University Professions, Inc. (Thomas C. Barry),* Case Nos. U-7449, 7482 (September 19, 1984). As noted in that decision, the New York PERB has also ruled in *Public Employees Federation (Raterman),* 15 N.Y. P.E.R.B. ¶3024 (1982), that a nonmember need not exhaust the internal union rebate procedure before challenging the union fee determination in court.

(c) Illinois—In *Hudson, supra,* the Seventh Circuit ruled that the state statute authorizing agency shop clauses in collective bargaining agreements with school boards was unconstitutional, as applied, under the First and Fourteenth Amendments. Furthermore, the Court's decision rests on separate "free speech" and "due process" considerations having different implications with respect to the scope of constitutional protection.

> The first implies that the public employer must establish a procedure that will make reasonably sure that the wages of nonunion employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining. The second implies that the procedure must make reasonably sure that those

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by appellant pursuant to 28 U.S.C. §§ 1275(3) and 2103. Naturally, Sup. Ct. R. 17.1(b) would also apply to the conflict which now exists between the decision of the Court of Appeals herein and that of the Seventh Circuit in *Hudson, supra.*

> employees' wages will not be used to support *any* union activities that are not germane to collective bargaining, whether or not the activities are political or ideological in nature.

117 L.R.R.M. at 2318 (emphasis in original).

Hudson correctly underscores the constitutional basis of the *Ellis* decision and delineates the multiple errors of the Michigan Court of Appeals in this case. Objecting nonmembers cannot be forced to exhaust an intra-union rebate scheme as a precondition to securing governmental protection of their constitutional rights; and escrow is required prior to the administrative or judicial determination of the constitutionally permissble fee. Where there has not been a judicial or administrative determination of the permissible fee amount and the union is unwilling to concede that it engages in any spending for purposes other than collective bargaining, the entire fee must temporarily be placed in escrow. Once there has been such a determination, the escrow account can be closed and an advance reduction of future fees based on that determination will adequately protect the constitutional rights of dissenting employees. Where, as here, the union concedes that it engages in some "rebatable" spending but a dispute exists over the remaining fee which has not yet been adjudicated by a court or administrative agency, advance reduction of the amount conceded *and* escrow of the remainder is the appropriate solution.

CONCLUSION

Appellees' motion to dismiss has no merit. This Court should grant the relief requested in the Jurisdictional Statement at 27.

Respectfully submitted,

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